Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CELEBRITY CRUISES, INC., ZENITH SHIPPING CORP., APOLLO SHIP CHANDLERS, INC., AND CELEBRITY CATERING SERVICES PARTNERSHIP,

Petitioners,

v.

JANE DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959), this Court held that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." Relying on two nineteenth century cases, however, the Eleventh Circuit held in the present case that cruise ship operators and other common carriers are strictly liable for intentional torts by their employees against passengers, even if such torts are committed by the employees while off duty and ashore. The Eleventh Circuit "agree[d] . . . that the age of the [earlier] decisions and the intervening decision in *Kermarec* suggest that the Supreme Court might well reconsider its former rulings were an opportunity to arise," but concluded that it was bound to follow its understanding of the earlier cases.

The question presented is whether cruise lines are strictly liable for assaults or other intentional torts committed by crew members against passengers—regardless of whether crew members are acting within the scope of their employment—or whether the liability of cruise lines for such torts should be decided instead under the "reasonable care under the circumstances" standard of *Kermarec*.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were defendants-appellants in the consolidated appeals below and are respondents in this Court: Baris Aydin and the M/V ZENITH (in rem).

RULE 29.6 STATEMENT

Royal Caribbean Cruises, Ltd. is the parent corporation of Celebrity Cruises, Inc. and Zenith Shipping Corp. Royal Caribbean Cruises, Ltd. has no parent corporation and no publicly held company owns ten percent or more of its stock. Apollo Ship Chandlers, Inc. has no parent company and no publicly held company owns ten percent or more of its stock. Celebrity Catering Services Partnership has no parent corporation and no publicly held company owns ten percent or more of an interest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Celebrity Cruises, Inc., Zenith Shipping Corp., Apollo Ship Chandlers, Inc. and Celebrity Catering Services Partnership respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 394 F.3d 891 (11th Cir. 2004). The pre-trial opinion of the United States District Court for the Southern District of Florida addressing the standard of care (Pet. App. 55a-73a) is reported at 145 F. Supp. 2d 1337. The district court's post-verdict opinion (Pet. App. 74a-87a) is reported at 287 F. Supp. 2d 1321.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1333. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on December 22, 2004. A timely petition for rehearing was denied on February 22, 2005. Pet. App. 89a. On May 10, 2005, Justice Kennedy extended the time to file a petition for a writ of certiorari to and including June 22, 2005. *See* Application No. 04A955. On June 9, 2005, Justice Kennedy further extended the time to file the petition to and including July 22, 2005. *Id.* The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, § 2 of the United States Constitution provides that the federal judicial power shall extend "to all Cases of admiralty and maritime Jurisdiction . . . ."

STATEMENT OF THE CASE

This case arises from a sexual assault allegedly suffered by respondent Jane Doe in Bermuda, while she was ashore with a crew member during a Caribbean cruise. Respondent contended, and the trial court agreed, that under federal maritime law common carriers, including cruise lines, are strictly liable for the intentional torts of crew members, even when such torts are clearly committed outside of the scope of employment. Following a jury trial in which the jury was so instructed, respondent was awarded $1 million.

1. In 1999, respondent purchased a round trip ticket for passage on the M/V ZENITH for a seven-day cruise from New York City to Bermuda. Doe boarded the ship on July 17, 1999, and it departed that day, arriving at Hamilton, Bermuda two days later. Doe and her friends disembarked the ship on the evening of July 19 and went ashore at Hamilton. In the early morning hours of July 20, Doe, along with her friends, attended a local nightclub called the Oasis, where they encountered certain M/V ZENITH crew members, including dining room waiter Baris Aydin. It is undisputed that Aydin was off-duty at the time.

Doe was admittedly intoxicated when she left the Oasis at about 3:30 a.m. She wished to use the restroom and Aydin volunteered to help her find one. The parties disputed at trial what occurred next. According to Doe, Aydin led her to a secluded park where he made uninvited sexual advances toward her. Doe testified that when she rejected Aydin's advances and asked to be taken back to her friends, Aydin had forcible, unconsented sexual contact and intercourse with her. According to Aydin's trial testimony, he and Doe went together to a grassy, public park where she removed part of her clothing and urinated. Doe and Aydin then began to kiss and eventually engaged in sexual intercourse. Aydin testified that Doe fully consented to all sexual activities between them.

Doe and Aydin walked together back to the M/V ZENITH where Doe spoke to one of her friends, who decided to report the incident to the ship's personnel as a rape. The ship performed a medical examination of Doe and contacted the Bermuda police. The police investigated the incident, took witness statements from Doe and various crew members and arrested Aydin. A Magistrate's hearing was subsequently held in which Doe testified under oath. Aydin was later released and all charges against him were dismissed after the Honorable Archibald Warner, Magistrate Judge for the criminal court in Bermuda and current Chief Judge, concluded Doe's testimony was, "Wholly and strikingly inconsistent with an allegation of sexual assault. It is self-contradicting and out of reason and all common sense . . . the complainant's evidence is weak and tenuous and [the Court] need not pretend to believe arrant nonsense."

2. Respondent Doe brought the present action to recover damages for alleged sexual assault and battery arising from the same incident in the public park in Bermuda. Jurisdiction was invoked under both 28 U.S.C. §§1332 and 1333. Doe urged that all petitioners were vicariously liable, without fault, for Aydin's alleged misconduct.[1]

Petitioners moved to dismiss Doe's claims on the ground, *inter alia*, that petitioners could not be held strictly liable for Aydin's off-duty conduct, because *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959),

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[1] The petitioners named as defendants in Doe's operative complaint were Celebrity Cruises, Inc., the operator of the M/V ZENITH; Zenith Shipping Corporation, the ship's owner; Celebrity Catering Services Partnership, the catering company that employs individuals in the food and beverage departments of Celebrity Cruises' vessels; Apollo Ship Chandlers Corporation, a provider of services to Celebrity Catering, and Aydin. Doe never served a summons or complaint upon Aydin.

establishes that cruise ship operators owe passengers only a duty of "care which is reasonable under the circumstances." Petitioners contended that a rule of absolute liability was especially inappropriate when the alleged intentional tort occurred off the vessel, and the alleged assailant was off-duty and not acting within the course and scope of his duties or in furtherance of any business purpose. Pet. App. 4a, 60a, 64a.

The district court acknowledged that "[t]he circuits are split" on whether "ship owners should be held strictly liable for their employees' misconduct," and it noted that "the Second Circuit has interpreted *Kermarec* broadly enough to eliminate vicarious liability for a crew member's intentional torts." Pet. App. 60a-61a. The court nonetheless concluded that, in light of this Court's decisions in *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887), and *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891), absolute vicarious liability is the applicable standard in any case involving an employee's intentional misconduct against a passenger, even when outside the scope of employment and off the ship, so long as the wrongdoing preceded termination of the contract of carriage. Pet. App. 60a-68a.

The case was reassigned to a different judge for trial. Two counts—one for sexual assault and another for battery—were tried before a jury on a strict vicarious liability theory.[2] The jury found that Aydin did not sexually assault Doe, but nonetheless concluded that he had committed sexual battery. The jury awarded Doe $1,000,000 in damages, and apportioned 25% of the damages to each petitioner.

Petitioners timely filed post-trial motions for judgment as a matter of law, new trial, and remittitur. The court found

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[2] Doe's claim for breach of contract was dismissed, and the Court granted petitioners' motion for judgment as a matter of law on Doe's claim for intentional infliction of emotional distress.

that it was constrained by the law of the case established by the previous judge's pre-trial determination that strict vicarious liability was the applicable standard. The court nonetheless granted judgment for petitioners under Fed. R. Civ. P. 50(b), because it found no evidence that any defendant was *both* a common carrier *and* Aydin's employer. Pet. App. 85a.

3. The Eleventh Circuit reversed the entry of judgment in petitioners' favor and reinstated the jury's verdict. The court of appeals first concluded that the district court erred in basing its grant of the Rule 50(b) motion on a ground that had not been raised by the defendants before the case was submitted to the jury.[3]

The court of appeals then turned to the question of the appropriate standard of liability. The court found "only three Supreme Court decisions that bear on the issue," *Brockett*, *Jopes*, and *Kermarec*, *supra*. Pet. App. 25a. The court concluded that the two nineteenth century cases, *Brockett* and *Jopes*, together established the proposition that a common carrier owes its passengers a duty of absolute protection from its crew members. Pet. App. 25a-30a. The Eleventh Circuit court agreed that, under *Kermarec*, "a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel," 358 U.S. at 630, but it believed that, in light of *Jopes* and *Brockett*, *Kermarec*'s rule does not apply to intentional torts committed by crew members against passengers.

The Eleventh Circuit noted that the Ninth Circuit has similarly concluded that *Kermarec* did not overrule the "maritime tort principle that a common carrier owes a duty to protect passengers from assaults by its crew members and is

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[3] Petitioners do not seek review of this aspect of the court of appeals' decision.

absolutely liable for such assaults." Pet. App. 39a (citing *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993)). By contrast, while the court believed that the relevant Second Circuit precedents are ambiguous, it conceded that district courts within the Second Circuit interpret those same precedents as rejecting the strict liability rule. Pet. App. 44a, n.30. In the end, the Eleventh Circuit felt bound to follow this Court's earlier precedents, despite their tension with *Kermarec*, absent further guidance from this Court (*id.* at 35a-36a):

> Although we agree with the defendants that the age of the *Brockett* and *Jopes* decisions and the intervening decision in *Kermarec* suggest that the Supreme Court might well reconsider its former rulings were an opportunity to arise, the defendants fail to persuade us that *Kermarec* overruled *Brockett* and *Jopes*, either explicitly or implicitly. Instead, we agree with Doe that *Brockett* and *Jopes* represent the current state of the controlling federal law as to crew member assaults on passengers.

REASONS FOR GRANTING THE WRIT

Modern maritime law—at least since this Court decided *Kermarec* in 1959—consistently recognizes that there is no sound reason for imposing on carriers a heightened duty of care with respect to dangers that passengers are just as likely to encounter on land as at sea. Indeed, with two isolated exceptions—the decision below and the earlier and similar Ninth Circuit ruling in *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993), also involving a sexual assault by a waiter—the circuits repeatedly have held that the extent to which the circumstances surrounding maritime travel are different from those encountered on land, and for that reason involve more danger to the passenger, must determine how high a degree of care is reasonably required of the carrier in each case.

Under this modern approach, it makes little sense to apply a more stringent rule of liability based on the conduct of waiters, cleaners, entertainers or other employees merely because their duties are on a ship rather than in a hotel. Indeed, to impose strict liability for the acts of employees whose functions have nothing to do with the passenger's safe carriage, especially for a sexual encounter occurring off the ship, is effectively to make the carrier an insurer. Whatever else may be said of *Brockett* and *Jopes*, it has been the rule since the earliest days of the Republic that common carriers are *not* insurers of the safety of their passengers. An interpretation of those cases that not only disregards this Court's most recent cases but also nullifies so venerable a principle of maritime law clearly warrants this Court's attention.

This case presents an ideal vehicle for the Court's consideration of these issues because the rationale for strict liability is particularly strained as applied to modern-day cruise ships. While common carriers traditionally employed workers primarily or exclusively to assist in transporting passengers, the vast majority of cruise ship employees have nothing to do with the ship's navigation. Indeed, a cruise ship's primary service is entertainment, not transportation. It offers the amenities of a large resort including dining, shopping, games and contests, salons, fitness centers, swimming pools, sports decks, casinos, movie theaters and infirmaries. A carrier cannot reasonably be expected to control and strictly safeguard the passengers' every movement within these expansive and diverse activities. A legal regime that requires carriers to do that—especially a regime based solely on two nineteenth century cases that do not reflect this Court's modern approach—should be reviewed and rejected by this Court.

I. The Decision Below Is Contrary To The Decisions Of This Court And Other Federal Courts

1. Since the earliest days of the Republic, this Court repeatedly has affirmed the principle that a common carrier is not an absolute insurer of the safety of its passengers. In *Stokes v. Saltonstall*, 38 U.S. 181 (1839), for example, this Court observed that a common carrier

> does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them, go to this extent: that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; *and that as far as human care and foresight can go, he will transport them safely.*

38 U.S. at 191 (emphasis added). *Stokes* involved a stagecoach accident, but this Court soon applied to maritime travel the rule that a carrier is not the absolute insurer of its passengers' safety. *The City of Panama*, 101 U.S. 453, 462 (1879).[4]

The Court again considered the question of a vessel operator's liability for a passenger's injuries in *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887). The plaintiff in *Brockett*, traveling as a deck passenger, sustained inju-

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[4] In *The City of Panama* a steamship passenger traveling from Washington to San Francisco was injured when she fell through an open hatch in the floor of her cabin. This Court observed:

> [T]he owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety . . . . Passengers must take the risk incident to the mode of travel which they select, but those risks in the legal sense are only such as the utmost care, skill, and caution of the carrier, in the preparation and management of the means of conveyance, are unable to avert.

101 U.S. at 462 (citations omitted).

ries when assaulted by crew members attempting to remove him from an area of the ship that was off-limits to deck passengers. This Court held:

> If the injuries necessarily arose from [plaintiff's] violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were . . . directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them, [plaintiff] is not precluded from claiming the benefit of the contract for safe transportation.

Id. at 645.

Although *Brockett* seemed to suggest that a common carrier's liability must be premised upon acts within the scope of employment (*Brockett*, 121 U.S. at 645, 646, 649), this Court seemingly discarded that limitation in *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891). There, the Court considered whether a railroad could be held absolutely liable for injuries a passenger sustained after being shot by the train's conductor. The Court held that if the conductor acted in self-defense, then the railroad—like the conductor himself—could not be held liable. *Id.* at 27. In reaching its decision, however, *Jopes* spoke broadly about the responsibility that a common carrier ordinarily has for the intentional acts of its employees.

In particular, *Jopes* contrasted the defense raised in that case—*i.e.*, that the conductor's action was in self-defense and thus lawful—with the claim, raised "in most cases in which an injury [has been] done by an employee," that the employee's action "was a wanton and willful act on his part, outside the scope of his employment, and therefore something for which his employer was not responsible." *Id.* at 26-27. The Court conceded that the "general rule" is that an

employer is not responsible for such wanton acts, but stated that "owing to the peculiar circumstances which surround the carrying of passengers . . . a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful and outside the scope of the employment." *Id.*

This Court most recently considered a common carrier's standard of liability in its seminal, unanimous decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In *Kermarec*, the plaintiff was visiting a crew member on the ship when he fell on a stairway. *Id.* at 626. The issue in the case was whether admiralty law should recognize the land-based distinction between an "invitee" and a "licensee" for purposes of determining the standard of care that the shipowner owed in the circumstances. Rejecting that distinction for maritime law purposes, the Court held broadly that a shipowner "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632. The Court noted that to import the "invitee"-"licensee" distinction would be contrary to the admiralty law's "traditions of simplicity and practicality." *Id.* at 631.

2. The evolution of this Court's precedents on the standard of care that a maritime carrier owes to its passengers has resulted in conflicting decisions from the courts of appeals. The Eleventh Circuit in this case, and the Ninth Circuit in *Morton*, have expressly declined to apply *Kermarec*'s "simpl[e] and practical[]" standard of care to cases involving allegations that crew members committed intentional torts against passengers. Instead, those circuits hold that a maritime carrier owes passengers "a duty of absolute protection"—a duty that permits recovery "simply by showing that the assault was committed by the crew member during the voyage." *Morton*, 984 F.2d at 291. The majority view, by contrast, does not attempt to parse common-law distinc-

tions—such as those between types of common-law torts suffered by passengers—and analyzes carriers' liability to passengers at a higher level of generality, guided both by *Kermarec*'s reasonableness standard and by the longstanding principle that a carrier is not an insurer of the safety of its passengers.

The Second Circuit, for example, has long refused—even before *Kermarec*—to impose on carriers a duty of absolute liability for torts suffered by passengers, whether intentional or otherwise. Thus, in *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2d Cir. 1914), the passenger was assaulted by a crew member while she was sailing from New York to Europe. The assailant used a pass-key that had been lost by another crew member. Although the ship's officers were aware the key had been lost, they negligently replaced the key instead of changing the locks. On appeal, the carrier assigned as error the fact that the jury was instructed that it was bound by "an obligation 'of the very highest degree of care to protect its passengers.'" *Id.* at 298. The Second Circuit had the following to say about the charge:

> Standing alone, it might possibly lead a jury to believe that the defendant was to be treated as an insurer of the safety of its passengers. But it did not stand alone. The judge . . . was most careful, even at the risk of giving some sound exceptions to plaintiff, to impress upon the jury that there could be *no recovery unless the proofs showed some specific neglect* in exercising that degree of care which reasonable prudence would require of a carrier obligated to be watchful and vigilant to protect its sleeping passengers.

Id. at 298-99 (emphasis added). The Second Circuit also referred to the "difference between assaults when obeying orders and purely wanton ones," and it emphasized that the defendant's liability was premised on that degree of care "which [it] can reasonably be required to exercise for the

safety and protection of passengers against such an assault as this." *Id.* at 299.

After *Kermarec* was decided, the Second Circuit again considered what standard of care should be imposed on carriers "in passenger cases" in *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 172 (2d Cir. 1983). The passenger in *Rainey* had tripped over a bar stool while dancing in the ship's discotheque. Although the Second Circuit acknowledged older cases that purport to impose on ocean carriers "a very high degree of care," it "h[e]ld that the *Kermarec* rule of reasonable care under the circumstances is applicable in passenger cases." *Id.* at 170, 172; *see also Monteleone v. Bahama Cruise Line*, 838 F.2d 63, 64-65 (2d Cir. 1988) ("Although some older cases called for a higher degree of care aboard ship, it is now clear in this Circuit that the appropriate standard is one of reasonable care under the circumstances. . . . Consistent with these principles, a ship owner is not an insurer of its passengers' safety. There thus must be some failure to exercise due care before liability may be imposed.") (internal citations omitted).

The Second Circuit emphasized in *Rainey* that "'what is required' [of carriers] 'is merely the conduct of the reasonable man of ordinary prudence under the circumstances, and the greater danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care.'" *Rainey*, 709 F.2d at 170 (quoting Prosser, *The Law of Torts* § 34, at 181 (4th ed. 1971)). As the court noted, that inquiry is fact-intensive, not categorical: "In some instances, reasonable care under the circumstances may be a very high degree of care; in other instances, it may be something less." *Id.* at 170-71. Under this approach, there is little reason to require a maritime carrier to exercise a higher degree of care with regard to dangers that passengers are just as likely to encounter on land, but there is room for imposing on carriers a heightened duty to protect passengers from

uniquely maritime dangers. The key inquiry, as the Second Circuit noted, is "[t]he extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger." *Id.* at 172.[5]

The Sixth Circuit reached the same conclusion in *Beard v. Norwegian Cruise Lines*, 900 F.2d 71 (6th Cir. 1990), which relied on *Rainey* to reject the contention that a ship's fare-paying passengers are entitled to a greater standard of care than *Kermarec*'s "reasonable care under the circumstances." *Id.* at 74. Quoting the Second Circuit's analysis, the court agreed that "the extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to a passenger, will determine how high a degree of care is reasonable in each case." *Id.* (quoting *Rainey*, 709 F.2d at 171). Other circuits similarly treat passenger claims under *Kermarec*'s flexible standard. *See, e.g., Muratore v. M/S SCOTIA*

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[5] The district courts in the Second Circuit, which hear a large number of admiralty cases, have recognized that the plain import of *Rivers*, *Rainey*, and *Monteleone* is to reject the strict liability rule adopted by the Ninth Circuit in *Morton* and followed by the Eleventh Circuit in this case. *See, e.g., Jaffess v. Home Lines, Inc.*, 1990 A.M.C. 1430 (S.D.N.Y. 1988); *York v. Commodore Cruise Line*, 863 F. Supp. 159 (S.D.N.Y. 1994). In *York*, for example, the plaintiff alleged that a cabin steward raped her while she was sailing as a paying passenger on the defendant's ship. Relying on Second Circuit precedents, the court rejected the notion that "sexual or verbal assaults are peculiar to maritime travel" and it refused to "hold defendants to an enhanced standard of care merely because th[e] incident allegedly occurred on a ship rather than land. . . . [A] shipowner is not an insurer of its passengers' safety." *Id.* at 162. Adverting to the Ninth Circuit's decision in *Morton*, the court stated: "Not only do we disagree with these cases, but we are bound by contrary Second Circuit precedent." *Id.*

PRINCE, 845 F.2d 347 (1st Cir. 1988); *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978); *Urian v. Milstead*, 473 F.2d 948 (8th Cir. 1973).

3. Although the Eleventh Circuit itself has followed *Rainey*'s approach in other cases, *e.g.*, *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984), it felt compelled by this Court's decisions in *Brockett* and *Jopes* to carve an exception to that approach for passenger claims involving intentional torts. The Eleventh Circuit's sweeping reading of those cases is, at the very least, highly questionable.

As noted, *Brockett* need not be read to require a strict liability standard for acts outside the scope of the employee's employment. While *Jopes* concededly stated in broad terms that a carrier is strictly liable for every conceivable wrong done to its passengers, irrespective of any scope-of-employment restriction, that language was not necessary to the judgment in the case and was therefore dictum. After all, no one suggested that the conductor was acting outside the scope of his employment, and this Court in fact *reversed* the jury's verdict in the plaintiff's favor because the self-defense instruction was slanted against the carrier. *Jopes*, 142 U.S. at 27-28. Had the Court intended to hold that a carrier owes passengers in all circumstances "a duty of absolute protection from the assaults and aggressions of its servants," *Morton*, 984 F.2d at 291, it is hard to see why *Jopes* reversed the judgment in plaintiff's favor. Indeed, such a broad reading of *Jopes* would have required this Court to overrule the settled principle, then recently reaffirmed in *City of Panama*, that a carrier is not an insurer of the safety of its passengers.

Even assuming that the Eleventh Circuit correctly concluded that *Jopes* adopted a strict liability standard, that court was wrong to conclude that such a standard could survive the reasoning of *Kermarec*. *Kermarec* excluded from the general rule of due care only crew members and other workers who

are already covered by specific statutes passed by Congress. 358 U.S. 632 at n.9. Moreover, given the almost universal agreement in the lower courts that *Kermarec* precludes imposing special duties on maritime carriers for hazards that passengers are just as likely to encounter on land, the creation of a special rule for assaults and other intentional torts—particularly those plainly committed outside the scope of a crew member's employment—cannot be justified logically.

It should be obvious that the danger of sexual assault is not uniquely associated with maritime travel. And it should be equally plain that the legal regime created by the decision below (and by the Ninth Circuit in *Morton*) is starkly counterintuitive: it imposes absolute liability on maritime carriers for the types of dangers they are least able to control (sexual assaults committed against passengers by off-duty crew members, even while ashore) but it applies a negligence standard to dangers arising from the condition of the vessel (such as defective carpeting, dangerous staircases, misplaced discotheque barstools) that presumably are more likely to be within the control of the carrier. If this Court's decisions in fact must be read to produce such a result, the anomaly should be reason enough for this Court to grant review to revisit them.

4. Modern developments in related areas of the common law also counsel strongly in favor of this Court's review. To the extent that a strict liability standard was ever appropriate for common carriers, it is increasingly clear today that there no longer exists a compelling rationale for holding common carriers to a higher standard of care than other employers, and there is a growing trend toward abandoning the harsh absolute liability rules that developed in the nineteenth century.

For example, one of the historical bases for imposing a higher standard of care on common carriers had been related to the more hazardous nature of rail or maritime travel. But

"that rationale has long since become outdated as public conveyances like trains, planes and boats have become at least as safe as private modes of travel." *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116, 121 (N.Y. 1996); *see also Lowrey v. Montgomery Kone, Inc.*, 42 P.3d 621 (Ariz. Ct. App. 2002) ("One underpinning from the steam railroad era—the perception that the instrumentalities of public transport were ultrahazardous—has been superseded . . . by more than a century of technological improvements and governmental regulation."). Similarly, although passengers on trains or boats may often be confined to close spaces and somewhat hampered in their ability to escape unwelcome assaults, "modern life includes a host of other situations in which a consumer of services, such as a hospital patient or movie theater patron, might be confined to a limited area or find his or her movements similarly curtailed." *Adams*, 88 N.Y.2d at 122.

Modern authorities also have concluded that tort principles should govern the standard of care owed by a common carrier to its passengers, and that liability should no longer be grounded in the theory that common carriers are bound by an implied contractual obligation to transport their passengers safely and properly. *See id.* at 119-20. In addition, courts are recognizing that it is not anomalous to allow carriers to avoid liability for the intentional torts of their employees, while continuing to hold them liable for their employees' negligent acts. As the New York Court of Appeals explained in *Adams*, that is the rule that governs non-common carrier employers and there is no good reason to impose a different rule on common carriers. Moreover, the *Adams* court concluded, vicarious liability is justifiable on an otherwise faultless employer only when the employee misconduct occurs within the scope of employment—a fact that is always present when an employee commits negligence but that is absent in the intentional tort context. *Adams*, 88 N.Y.2d at 122-23. Thus, in *Adams*, the court held that the New York Transit Authority

was not liable for a token booth clerk's assault on a subway rider.

In so holding, the New York Court of Appeals concluded that the more expansive, nineteenth century liability rule imposed on common carriers is no longer viable as a matter of law or public policy, and that conduct committed outside the course of employment should not give rise to vicarious liability on the part of a common carrier employer. *Id.* at 118. Other courts have similarly held recently that carriers should only be required to protect their passengers from "foreseeable" harm, and have in turn rejected imposing strict liability for the torts committed by employees outside of their employment. *See Sebastian v. District of Columbia*, 636 A.2d 958, 962 (D.C. 1994) (refusing to apply strict liability for an ambulance attendant's assault of a passenger). In short, there is increasing recognition that it is no longer sensible to hold common carriers to a higher standard of liability than the one applicable to other employers. The original rationales given for the distinction simply no longer hold weight.

* * *

In sum, the Eleventh and Ninth Circuits have created a special category of cases—intentional tort claims by passengers against maritime carriers—for which they have adopted a rule of stringent, absolute vicarious liability. That rule cannot be reconciled with *Kermarec,* which has been interpreted virtually universally by the lower courts to preclude heightened standards of care for dangers that passengers are just as likely to encounter on land. It cannot be reconciled with logic or with the venerable rule that carriers are not insurers of the safety of their passengers. And it cannot be reconciled with the modern trend of tort doctrine in the state courts. The conflicts created by the decision below clearly warrant this Court's review.

II. The Question Presented Is Important, Recurring, And Uniquely Suited For This Court's Review

The issues presented by this case are important, recurring, and uniquely appropriate for resolution by this Court. In light of the Constitution's grant of admiralty jurisdiction, and Congress' longstanding concern with the uniformity of maritime law (which has led Congress to bestow on federal courts "exclusive" jurisdiction over such cases since 1789), this Court's intervention is especially warranted and appropriate to ensure the orderly, consistent, and uniform development of judge-made rules in admiralty. *See, e.g.*, *Offshore Logistics, Inv. v. Tallentire*, 477 U.S. 207, 221 (1986); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 601 (1974); *The Lottawanna*, 88 U.S. 558 (1874). Indeed, the need for uniformity in this field of law is so great that this Court has recognized that even Congress is powerless to adopt rules of law that would lead to state-by-state variations in admiralty law. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

The need for this Court's intervention is especially great if the court of appeals was correct in concluding that *Brockett* and *Jopes* require that courts apply a special rule to intentional torts despite the unqualified holding and reasoning of this Court's subsequent decision in *Kermarec*. This Court has repeatedly admonished lower courts that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see also Tenet v. Doe*, 125 S. Ct. 1230, 1237 (2005); *United States v. Hatter*, 532 U.S. 557, 567 (2001); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Conversely, this Court's review is most clearly war-

ranted where, as the Eleventh Circuit believed is the case here, this Court's recent cases have eroded the logical foundations of earlier precedents without squarely and expressly overruling them. Because the lower courts are powerless to restore coherence to the law even when it is apparent that earlier precedents rest on "increasingly wobbly, moth-eaten foundations," *Khan*, 522 U.S. at 20, this Court has frequently granted review to fulfill that obligation itself.

Significantly, this Court has granted review to reconcile the *rationale* for its precedents in a given area even when it would have been possible to articulate some distinction that rendered the case law consistent at a purely formal level. In *Rodriguez de Quijas*, for example, the issue was whether claims under the Securities Act of 1933 were arbitrable. The Court had squarely held several decades earlier that such claims are *not* arbitrable, but had more recently held that claims under the Securities Exchange Act of 1934 *were* arbitrable. Although it was possible for lower courts to apply both precedents on the basis of a purely formal distinction between the 1933 and 1934 Acts—much as the Eleventh Circuit distinguished between accidental injuries and intentional torts in order to save a sphere of operation for each line of precedent here—this Court granted review (and ultimately overruled the earlier 1933 Act case) because it recognized that the regime created by the totality of this Court's cases was not logically coherent. *See also Khan*, 522 U.S. at 15-22 (after Seventh Circuit had applied a precedent whose logic had been eroded by more recent cases, this Court granted review and overruled earlier precedent). Thus, if the Eleventh Circuit correctly concluded that *Brockett* and *Jopes* require a strict liability standard, and that *Kermarec*'s broad holding did not implicitly overrule that rule, only this Court can now restore coherence to this area of the law.

Moreover, the issues presented in this case are recurring ones. Statistics compiled by the Administrative Office of the

United States Courts reveal that more than 1,900 marine personal injury cases were commenced in the federal courts for the 12-month period ending March 31, 2004. *See* Federal Judicial Caseload Statistics, Mar. 31, 2004, at Table C-2, *available at* http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf.[6] The frequency with which courts must grapple with questions regarding the proper standard of liability to apply in these cases strongly counsels in favor of this Court's review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 22, 2005

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[6] That number does not include the numerous cases brought in state courts, in which federal court precedent is often applied to maritime law issues.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15321

D.C. Docket No. 00-02523-CV-JEM

JANE DOE,

Plaintiff-Appellant-Cross Appellee,

versus

CELEBRITY CRUISES, INC., in personam,
ZENITH SHIPPING CORPORATION, in personam,
APOLLO SHIP CHANDLERS, INC., in personam,
CELEBRITY CATERING SERVICES PARTNERSHIP, in personam

Defendants-Appellees-Cross-Appellants,

BARIS AYDIN, In personam,
M/V ZENITH, her engines,
boilers, tackle, etc., in rem,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(December 22, 2004)

Before HULL and MARCUS, Circuit Judges, and MILLS*, District Judge.

HULL, Circuit Judge:

This appeal presents the question of what standard of care governs when a cruise line's crew member sexually batters a passenger. In a pre-trial ruling, the district court determined that a cruise line, as a common carrier, owes a duty of protection and safe transport to its passengers, and thus is strictly liable for crew member assaults on passengers. The jury trial focused on whether the plaintiff consented or was sexually battered by the crew member.

After the verdict and entry of judgment for the plaintiff, the district court *sua sponte* raised an entirely new issue regarding which of the four defendants actually employed the errant crew member and whether that employer was a common carrier. Soon thereafter, the district court granted a Rule 50(b) judgment as a matter of law to all defendants, concluding that the plaintiff failed to prove any single defendant was both a common carrier and the employer of the crew member and therefore that no defendant was liable for the crew member's assault.

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

After review and oral argument, we reverse the Rule 50(b) entry of judgment for the defendants because the district court lacked authority to enter judgment under Rule 50(b) on a new ground not raised by any party prior to submission of the case to the jury. We also reinstate and affirm the jury's verdict for the plaintiff because we conclude that under federal maritime law, a cruise line is strictly liable for crew member assaults on passengers during the cruise.

I. PROCEDURAL HISTORY

On July 17, 1999, Plaintiff Jane Doe, as a passenger on the cruise ship M/V ZENITH, embarked on a one-week round-trip cruise from New York City to Bermuda. During the cruise, Doe reported to the cruise line's medical staff that Baris Aydin, a crew member and Doe's dinner waiter, raped her. The medical staff treated Doe, and the cruise line flew her home from Bermuda on July 21, 1999.

A. Original Complaint

On July 14, 2000, Doe filed a nine-count complaint against defendants Celebrity Cruises, Inc., Zenith Shipping Corporation, Apollo Ship Chandlers, and against the M/V ZENITH, her engines, boilers, tackle, etc., *in rem*.[1]

Based on Aydin's rape of Doe, the complaint alleged one count each of sexual assault, sexual battery, and negligence, two counts of breach of the contract of carriage, two

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[1] Celebrity Cruises, Inc. is the operator of the M/V ZENITH; Zenith Shipping Corporation is the owner of the vessel; and Apollo Ship Chandlers provides certain services and personnel to Celebrity Catering Services Partnership, which in turn provides food and beverage services to Celebrity Cruises' vessels. Doe later added Celebrity Catering Services Partnership as the fourth defendant.

counts of intentional infliction of emotional distress, and two counts of negligent infliction of emotional distress.[2]

The defendants collectively moved to dismiss the complaint, contending that they are not liable for Aydin's intentional misconduct. Defendants argued that they are liable (1) only for their own breach of reasonable care under the circumstances and (2) only for their employees' intentional conduct while acting within the scope of their employment and in furtherance of the defendants' business purposes.

Denying defendants' motion in part, the district court ruled that a cruise line, as a common carrier, is strictly liable for crew member assaults on passengers. The district court dismissed without prejudice parts of Doe's complaint and allowed Doe to amend her complaint to allege vicarious or strict liability causes of action.[3]

B. Third Amended Complaint

Doe amended her complaint three times. Those amendments (1) added Celebrity Catering Services Partnership as a defendant, (2) alleged more specific facts on two theories of negligence, and (3) added four vicarious or strict liability counts. The third amended complaint alleged five causes of action against all four defendants: (1) several theories of neg-

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[2] The original complaint contained allegations about the negligent treatment Doe received from the cruise line's medical staff and security personnel after the rape. These claims are not at issue in this appeal. As noted later, the district court dismissed parts of Doe's complaint with prejudice (including her breach of contract claims), and Doe has not appealed that dismissal.

[3] Doe's complaint also named Baris Aydin, the crew member, as a defendant, but he was never served with process and was not a defendant at trial.

ligence; (2) vicarious or strict liability for Aydin's sexual assault of Doe; (3) vicarious or strict liability for Aydin's battery of Doe; (4) vicarious or strict liability for Aydin's intentional infliction of emotional distress against Doe; and (4) vicarious or strict liability for Aydin's negligent infliction of emotional distress upon Doe.

In each strict liability count, Doe alleged that all defendants "are responsible and/or are strictly liable for the acts of their respective employees, servants and/or agents, including defendant Aydin," as follows:

> As a crew member of the M/V ZENITH, Aydin owed a duty to protect and care for the plaintiff's safety. He, instead, deliberately, knowingly and intentionally breached this duty by sexually assaulting, raping and/or battering the plaintiff. . . . Defendants Celebrity, ZSC, M/V ZENITH, Apollo and/or Celebrity Catering are responsible for and/or are strictly or vicariously liable for the acts of their respective employees, servants and/or agents, including defendant Aydin.

After the ruling on the defendants' motion to dismiss and the filing of the third amended complaint, the parties litigated the case as a tort case.

C. Pre-Trial Stipulation and Trial

On October 18, 2002, the parties entered into a pre-trial stipulation. Notably, they stipulated that "[f]or the purposes of the forthcoming trial, the parties will try only those issues relating to the strict (vicarious) liability standard as articulated and ordered by [the district court] in [its] Order dated February 26, 2001." Specifically, the parties' stipulation stated that these issues of fact remained to be litigated:

> A. As to the issue of rape, sexual assault and battery, whether or not the Plaintiff consented to the sexual contact with Aydin.
>
> B. As to damages, the precise nature and extent of the damages claimed.
>
> C. The Plaintiff has a cause of action for Intentional Infliction of Emotional Distress. The parties disagree whether this cause of action is subsumed within the strict liability count or whether it should be presented separately at trial.

No one raised a legal or fact issue about which of the four defendants employed Aydin or about whether Aydin's employer was a common carrier. Instead, as to the strict liability claim, the defendants chose to litigate only whether Doe consented to the sexual intercourse and the amount of damages.

The case proceeded to trial, and at the close of the plaintiff's evidence, the defendants filed three separate written motions for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Specifically, defendants' Rule 50(a) motions argued: (1) that as to Doe's intentional infliction of emotional distress claims, Doe failed to show an independent tort (other than the alleged rape) rising to the level of "outrageousness" required under Florida law; (2) that as to the assault and battery claims, Doe failed to provide sufficient evidence from which a jury could find that Aydin intended to batter or assault Doe; and (3) that as to the strict liability claims, "notwithstanding [the pre-trial] ruling. . . that strict liability applies," the "Defendants renew the arguments put forth in their Motion(s) to Dismiss." In other words, the third Rule 50(a) motion renewed their objections to the strict liability standard insofar as it applied to common carriers at all. Again, no defendant ever raised any issue re-

lating to the status of Aydin's employer as a common carrier. The district court granted the defendants' motion for judgment as a matter of law on Doe's emotional distress claims, but denied the other two motions.

At the close of all evidence, the defendants orally "renewed all of [their] previously denied directed verdict motions." The district court denied the defendants' Rule 50(a) motions again and submitted Doe's sexual assault and sexual battery claims to the jury.

As to the sexual battery, the district court instructed the jury that the defendants were strictly liable if Doe proved actual sexual penetration and that "that act" was done without her consent, as follows:

> **Sexual Battery**
>
> On Plaintiff's claim for sexual battery, Defendants, CELEBRITY CRUISES, ZENITH SHIPPING CORPORATION, APOLLO SHIP CHANDLERS, INC., and CELEBRITY CATERING SERVICES PARTNERSHIP are strictly liable to Plaintiff for sexual battery if Plaintiff shows, by the greater weight of the evidence, the following:
>
> That Baris Aydin, with his sexual organ, *penetrated or had union* with the vagina of Plaintiff; and
>
> *That act was done without the consent of Plaintiff.*

(emphasis added). In contrast, as to the sexual assault, the district court instructed the jury that the defendants were strictly liable if Doe proved Aydin (1) "intended to commit a sexual battery" *and* that "the attempted act" was done without Doe's consent, *or* (2) "intended to cause the plaintiff to

fear a sexual battery" *and* that "the attempted act" was done without her consent, as follows:

Sexual Assault

> On Plaintiff's claim for sexual assault, Defendants. . . are strictly liable for sexual assault if Plaintiff shows, by the greater weight of the evidence, either:
>
> a) That Baris Aydin intended to commit a sexual battery on the person of Plaintiff; *and that the attempted act was done without the consent of Plaintiff*; or
>
> b) That Baris Aydin intended to cause Plaintiff to fear an immediate sexual battery or rape; *and that the attempted act was done without the consent of Plaintiff.*

(emphasis added). Thus, as charged, a finding of sexual battery required actual penetration without Doe's consent; whereas, a finding of sexual assault required a specific intent to commit a crime and only an "attempted act" without Doe's consent.

On November 22, 2002, the jury returned a verdict for Doe on her sexual battery claim, awarded her $1 million in compensatory damages, and allocated fault equally among the four defendants. The jury returned a verdict for the defendants on Doe's sexual assault claim.

When the jury announced its verdict, the defendants immediately sought re submission of the claims and defenses "in light of the seemingly inconsistent verdict." After hearing argument and reviewing the memoranda filed by the parties on this point, the district court denied the defendants' request to have the jury revisit its verdict. On November 27, 2002, the district court entered final judgment on the verdict in favor of Doe and against all defendants.

D. Post-Judgment Motions

On December 12, 2002, the defendants filed three separate motions: (1) for remittitur of the amount of the jury verdict, (2) for a new trial based on the allegedly inconsistent verdicts and several allegedly erroneous evidentiary rulings, and (3) for judgment as a matter of law under Rule 50(b). The defendants' Rule 50(b) motion renewed their objections to the pre-trial ruling about strict liability and argued that Aydin's conduct was outside the scope of his employment and that defendants were thus not vicariously or strictly liable for his acts.

Alternatively, even if the strict liability standard applied, defendants argued that strict liability requires an intentional tort and that strict liability could not attach based on Aydin's sexual battery because the court's jury instruction on sexual battery did not include an intent element. According to the defendants, once the jury found for them on the issue of sexual assault (the only one of the two torts that contained a specific intent element), defendants were entitled to judgment as a matter of law.

At the March 18, 2003, hearing on these post-judgment motions, the district court raised, *sua sponte*, the issue of whether any one of the four defendants was both a common carrier and Aydin's employer, and ordered further briefing on the issue. It is undisputed that at trial the defendants never moved under Rule 50(a) for judgment on the basis that Doe had failed to prove which of the four defendants actually employed Aydin and whether that particular defendant was a common carrier.

On September 23, 2003, the district court entered an order granting the defendants' Rule 50(b) motion for judgment as a matter of law but solely on the new ground that none of the defendants was both a common carrier *and* Aydin's employer, and that since no defendant met both requirements,

no defendant could be liable. The district court also vacated its November 17, 2002, judgment in favor of Doe and entered an amended final judgment in favor of all defendants.[4] The district court then denied as moot the defendants' other post-judgment motions for remittitur and for new trial.

Doe appeals from this amended final judgment and the district court's September 23, 2003, order granting judgment as a matter of law to defendants under Rule 50(b) based on lack of proof that anyone defendant was both a common carrier and Aydin's employer. Defendants cross-appeal, asserting that the district court erred in imposing a strict liability standard for crew member assaults and in denying their Rule 50(a) and 50(b) motions that renewed their objections to that strict liability standard.

Before examining the issues on appeal, we recount the evidence at trial.

II. TRIAL EVIDENCE

In July of 1999, Baris Aydin lived aboard the cruise ship M/V ZENITH, and worked as a ship waiter 16 hours a day, seven days a week. Aydin worked breakfast, lunch, dinner and the midnight buffet, and served the same set of passengers at dinner every night for the duration of their cruise.

The defendants mainly utilized a "tipping system" for paying Aydin and apparently other similarly-situated crew members. Passengers were assigned to the same dinner table and waiter each night. The guests whom Aydin served at his

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[4] Shortly before trial, this case was reassigned to a different district court judge. Thus, the judge who made the pre-trial ruling as to strict liability was different from the judge who presided over the trial and granted the Rule 50(b) judgment as a matter of law for the defendants.

tables left money in envelopes or gave it to him personally. He made $800-$1,000 per week in tips. In addition to tipping him, Aydin's assigned dinner passengers filled out evaluations at the end of the cruise. These evaluations determined how many tables/passengers Aydin was assigned, and therefore how much money he made in tips. Aydin testified that there is a direct relationship between the satisfaction of his passengers and his income.[5]

Plaintiff Doe purchased a ticket for a round-trip cruise from New York to Bermuda aboard the M/V ZENITH. Doe and five of her friends, all in their early twenties, went on the cruise with four parents. Their group was assigned to a table in the dining area where Aydin waited on them at dinner each night.

On the third morning of the cruise, the M/V ZENITH arrived in Hamilton, Bermuda, a scheduled port-of-call. At dinner, one of Doe's friends asked Aydin "if he knew of any good places to go out on the island because the crew had been there before." Aydin suggested that they go to the Oasis disco club, which they did.

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[5] Doe claims that cruise lines, such as the defendants', largely hire foreign nationals, such as Aydin, as waiters on their vessels, but that cruise lines do not pay them. Rather, cruise lines set up a table assignment and tipping system and rely on passengers' paying the waiters through that tipping system. Further, the defendants' waiters work on the ship but live elsewhere, and thus passengers (who pay directly defendants' waiters) have little chance of obtaining jurisdiction in American courts over them or of serving process on them even if jurisdiction exists. Aydin is a Turkish national, and as noted earlier, Doe herself was unable to locate Aydin to serve him.

Aydin's suggestion was not surprising because when the M/V ZENITH was in port at Hamilton, Bermuda, it was customary for the crew and passengers to mingle off the ship at the Oasis. Indeed, the Oasis is a short, five-to-ten-minute walk from the ship, and the ship is clearly visible from the club. While the Oasis closes after 3:00 a.m., Aydin testified that normally crew and passengers stay outside for awhile after closing time. "There are lots of people who sit down around and chat and have fun. . . . This is what usually the people do after the club closes, they stay there and they sit down. They hang out, talk. They chat." The ship's chief security officer testified that "it would be unusual not to see any passenger or crew" on Front Street near the cruise terminal or the front of the Oasis at 3:00 or 4:00 in the morning.

When Doe's group arrived at the Oasis, they found several M/V ZENITH crew members there, including Aydin whom they recognized as their waiter. The six women and three male crew members, including Aydin, "pretty much hung out together. . . basically having a good time, dancing and drinking."

The Oasis closed sometime after 3:00 a.m. Doe's group of women and the three crew members went outside. Two women decided to return to the ship, and Aydin escorted them on the short walk back to the ship. Aydin then returned to the group outside the Oasis and discovered Doe lying on the ground in need of assistance.[6] Aydin offered to help her

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[6] The extent of the plaintiff's inebriation and her reason for needing help were contested at trial. Aydin claims that Doe just needed a bathroom, and she appeared "drunk" but "she seemed very happy." Doe claims that she was visibly intoxicated to the point of nausea, was attempting to vomit in the street, could not walk or stand without support and that Aydin said he would "help

[Footnote continued on next page]

find a bathroom, and they attempted to go back to the Oasis, but found it closed. They then walked back down Front Street in the direction of the ship.[7]

Doe thought she was going back to the ship and did not feel any concern on the walk "[b]ecause I trusted him. He was a crew member and I know [sic] he was going to take me somewhere to use the bathroom to throw up." Doe further testified that "the only reason [she was] willing to even go for a block and a half or two block walk with [Aydin] was because he worked on the ship."

Aydin and Doe walked past the ship to a small public park. The ship is clearly visible throughout the walk, and one need only take "four or five steps out of the park, stand on Queen Street and the ship [is] right there looking at you." The jury found that in the park Aydin committed sexual battery against Doe, which the court had charged as sexual penetration without her consent. According to Doe, Aydin pushed her to the ground, bit her lip, and shoved his fingers in her mouth to keep her quiet. Doe cried and indicated repeatedly that she wanted him to stop.

After the sexual encounter, Aydin and Doe walked straight to the ship and split up, with Aydin walking ahead of her on the gangway. Doe went to her room. Doe's friends found her there, distraught, and took her to the infirmary.

[Footnote continued from previous page]
[her] find a bathroom to throw up." In the light most favorable to Doe, we must consider her as a sick passenger in distress who needed assistance back to the ship.

[7] Doe's best friend and ship roommate had no qualms or reservations about letting Doe walk off with Aydin "[b]ecause . . . he was a crew member. He was there to-he was going to help her." She would not have let her friend walk off with a stranger.

Doe reported to the nurse "that I went out with some friends, and that I was just raped by one of the crew-members." The ship's doctor administered a rape kit, and Doe filed a report with the ship's security personnel.

After speaking to Bermudian authorities, Doe flew home, along with a friend and that friend's parents, on a flight paid for by defendant Celebrity Cruises. She was examined again at a hospital in Connecticut. All of the medical records were admitted into evidence. Over the following months, she attended numerous counseling sessions for "rape survival" and other issues.

Celebrity Cruises' policy prohibited crew fraternization with passengers while on the ship, but permitted it when passengers and crew left the ship at ports-of-call during the cruise. Aydin testified that, while there was no Celebrity policy that crew members *must* assist passengers while off the ship and off duty, "[i]f they are my guest, I always have to be polite with them, because I am making my money from those people, and my ratings, too. . . [I]f it is about the passenger, then I help them, for if I refuse to help them, then they give me trouble." It was Aydin's understanding that, while on shore, Celebrity Cruises allowed him not only to socialize with its passengers, but also to have sex with them.[8]

III. DISCUSSION

This is a maritime case about a crew member's sexual battery of a passenger. Before discussing the issues on ap-

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[8] Aydin testified that he had the opportunity to have sex with female passengers on many occasions, if he had so desired. However, in his three years of working on the M/V ZENITH, Aydin had sex with passengers on only three occasions, including the incident in question.

peal, we discuss why this case was brought in district court in Miami, Florida and is within that federal court's admiralty jurisdiction.

A. Jurisdictional Issues

As for why Doe chose a Florida venue, Doe's contract with the defendants contained a forum selection clause requiring that "all disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated, if at all, in and before a court located in Miami, Florida, U.S.A." Although Doe is a Connecticut resident, and the sexual battery occurred on a round-trip cruise from New York to Bermuda, she had no choice but to sue in Miami, Florida.

As for jurisdiction, Doe's third amended complaint alleged subject matter jurisdiction based upon both admiralty jurisdiction and diversity of citizenship. Because Doe is a resident of Connecticut and no defendant resides there, diversity jurisdiction clearly exists. *See* 28 U.S.C. § 1332(a); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998); *Great No. Ry. Co. v. Galbreath Cattle Co.*, 271 U.S. 99, 102-103,46 S. Ct. 439, 440 (1926). In the past, this Court applied admiralty law in a diversity case without specifically deciding whether admiralty jurisdiction existed. *See Shultz v. Florida Keys Dive Center, Inc.*, 224 F.3d 1269, 1272 (11th Cir. 2000) (explaining "[t]he question here, however, is not whether subject matter jurisdiction is satisfied, for this case is within the diversity jurisdiction of the federal court, but whether to apply federal admiralty law or state law to a case within the court's jurisdiction"). Furthermore, all parties here continue to assert that the federal maritime law governs Doe's claims against the defendants. Thus, given that diversity jurisdiction exists and the parties' agreement that admiralty law applies, we historically have gone no further.

However, the Supreme Court's recent decision in *Norfolk Southern Railway Co. v. Kirby*, 125 S. Ct. 385 (2004), suggests that in order for this Court to apply admiralty law, this Court *must* have admiralty jurisdiction. *Id.* at 392-93 ("Indeed, for federal common law to apply in these circumstances, this suit *must* also be sustainable under the admiralty jurisdiction. . . . [T]he grant of admiralty jurisdiction and the power to make admiralty law are mutually dependant. . . ."). Although defendants never challenged the alleged admiralty jurisdiction, we have an independent duty to ensure admiralty jurisdiction exists before applying admiralty law. *See Norfolk*, 125 S. Ct. at 392-93; *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998).

"[A] party seeking to invoke federal admiralty jurisdiction. . . over a tort claim must satisfy conditions both of location and of connection with maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527,534,115 S. Ct. 1043, 1048 (1995). Therefore, this Court must determine if two conditions exist: (1) location and (2) connection with maritime activity. We address the connection with maritime activity first.

As the Supreme Court stated in *Grubart*, "[t]he connection test raises two issues," which are:

> A court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."

Id. (internal quotation marks and citations omitted).

We readily dispense with the first issue of the connection test. As the cruise line industry is maritime commerce, a

crew member's sexual assault on a passenger obviously "has a potentially disruptive impact on maritime commerce." It is easy to imagine that if rape or other forms of sexual battery became a concern of passengers, cruise-ship business would necessarily suffer.

As for the second issue of the connection test, the character of the activity here is the interaction between crew members and passengers during an ongoing cruise, which clearly bears a "substantial relationship to traditional maritime activity." Thus, for example, in this case the errant crew member was assigned to serve as the victim's waiter each night while on board the ship, and was permitted to socialize with passengers on shore. In fact, it was customary for crew members and passengers to socialize at the Oasis bar during this particular cruise. The night of the sexual battery, the crew member (at dinner on the ship) directed the victim's group to the Oasis, was there when the victim arrived, and later offered to provide her assistance. The crew member ultimately accompanied Doe back to the ship. Doe then reported her encounter with the crew member to the ship's security personnel and was examined by medical staff aboard the cruise ship. Accordingly, we conclude that the interaction between Doe and the crew member satisfies the connection-with-maritime-activity prong.

We also must consider the location of the tort. Admiralty jurisdiction obviously exists where a crew member sexually batters a passenger while the two are onboard the ship. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959) ("Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law.") (collecting cases).

Although some temptation exists to draw a bright line between a crew member assault of a passenger that occurs on the ship versus in a port-of-call, "the situation presented here has a more genuinely salty flavor than that." *Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 81 S. Ct. 886, 894 (1961). Furthermore, the Supreme Court recently has taken an expansive view of admiralty jurisdiction and stated that in modern maritime commerce "the shore is now an artificial place to draw a line." *Norfolk*, 125 S. Ct. at 388.

Although this case may represent the outer boundaries of admiralty jurisdiction over torts, we conclude that admiralty jurisdiction extends to the location of the sexual battery under the peculiar circumstances of this case for several reasons. First, the stop in Bermuda was a scheduled port-of-call, and was an integral part of the on-going cruise or maritime activity in this case. Ports-of-call not only add to the enjoyment of a cruise but form an essential function of the cruise experience. In fact, on this particular cruise, five of the seven nights were to be spent in Bermudian ports. Plainly, individuals choose cruise ship vacations because they want to visit unfamiliar places ashore. Cruises to Alaska, the New England States, Bermuda or the Carribean offer fundamentally different experiences, not generally because of any material difference between ships, but often because of where the ships elect to *stop*. *See Isham v. Pacific Far East Line, Inc.*, 476 F.2d 835, 837 (9th Cir. 1973) ("Where a passenger or cruise vessel puts into numerous ports in the course of a cruise, these stopovers are the sine qua non of the cruise."). When a passenger selects a particular cruise, ports-of-call or stopovers provide those passengers with the "cruise experience" for which they are paying. Simply put, the destinations or ports-of-call are frequently the main attraction.

Just as ports-of-call serve as an integral part of the maritime cruise, nothing about the particular facts of this case

takes the crew member sexual battery outside the scope of this Court's admiralty jurisdiction. The sexual battery occurred very close to the docked ship, and neither the victim passenger nor the crew member left the port-of-call or traveled any real distance from the ship. *See generally, Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251, 1253 n.5 (8th Cir. 1980) ("Although it might be argued that Makela's injury is remote from the wrongful act, the accident occurred some six minutes after the S.S. Flamingo docked, on a street that adjoins the dock."). As demonstrated by the facts of this case, when docked at the port-of-call, the cruise ship allowed passengers to come and go from the ship as they elected; consequently, there was little practical difference between the port-of-call and other parts of the ship—they were, at all times, equally accessible to passengers. Indeed, the ship literally cast a long shadow; it was close by and visible from the Oasis. It is thus not surprising that passengers and crew members routinely went back and forth between the Oasis and the ship, and routinely socialized together at the Oasis.

Moreover, in many ways this particular incident effectively began and ended aboard the cruise ship. The necessary precursors for this sexual battery occurred while the ship was on navigable waters; that is, it would not have occurred if the ship had not assigned Aydin to be Doe's waiter or if Aydin had not directed Doe's group to attend this particular bar within eyeshot of the ship on that fateful night. And the incident did not end until Aydin and Doe returned to the ship and parted ways.

More importantly, the purpose behind the exercise of this Court's admiralty jurisdiction is to provide for the uniform application of general maritime law. Plainly, the standard of care that governs when a cruise line's crew member assaults a passenger should be uniform and not vary from port to port on a single cruise. Jane Doe was no less a cruise

passenger the moment she stepped off the ship at the port-of-call than she was the moment before she stepped off the ship. We see no reason that cruise lines' liability to their passengers while at a regularly scheduled port-of-call and in a crew member's company should vary from port to port, especially given the potentially disruptive impact on maritime commerce.[9] Indeed, a ruling that admiralty jurisdiction did not extend literally beyond the gangplank in this case would upset the very uniformity that the Supreme Court has determined is so important for maritime activity. *See Norfolk*, 125 S. Ct. at 388; *Grubart*, 513 U.S. at 532, 115 S. Ct. at 1047-48.

For these reasons, we conclude that this Court has admiralty jurisdiction over the case. Consequently, we apply federal admiralty law, the law both requested and argued by the parties, to the events that occurred between crew member Aydin and passenger Doe.

B. Rule 50(b) Motion

As detailed above, at the close of plaintiff's evidence, defendants moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. At the close of all the evidence, defendants renewed certain Rule 50(a) motions. After the jury's verdict, defendants filed post-judgment motions pursuant to Rule 50(b). None of the defendants' Rule 50(a) or 50(b) motions, however, raised the evidentiary issue of whether Doe had proved that anyone defendant was both a common carrier and Aydin's employer.

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[9] There is nothing inherently local about the cruise line-passenger relationship in this case that militates against the application of the uniform law of admiralty. In fact, no party has articulated any Bermudian interests at stake in determining the *civil* liability between Doe and the defendants in this case.

Nonetheless, after the defendants' Rule 50(b) motions were filed, the district court *sua sponte* raised this evidentiary issue. According to the district court,

> [i]n reviewing the post-verdict motions, the Court became concerned *sua sponte* with whether Plaintiff had shown the Defendants were common carriers who employed Aydin, thereby properly imposing liability for Aydin's tortious act of sexual battery, as found by the jury. Although neither party *at any time* raised this issue, the Court under Fed. R. Civ. P. 50(b) shall consider it.

(emphasis added). The district court ultimately concluded that "there is no Defendant in this case who is both a common carrier and Aydin's employer for this Court to impose strict liability for the tort the jury found was committed by Aydin against Doe." On this sole evidentiary ground, the district court granted all defendants judgment as a matter of law under Rule 50(b).

We review *de novo* the district court's rulings on motions under Rule 50 of the Federal Rules of Civil Procedure, examining the trial evidence in the light most favorable to the non-moving party. *Thosteson v. United States*, 331 F.3d 1294, 1298 (11th Cir. 2003).

In making its Rule 50(b) rulings, the district court clearly erred because it lacked authority to enter judgment under Rule 50(b) for the defendants on a ground not raised prior to the submission of the case to the jury. Rule 50(b) expressly provides that, after a jury verdict, a party "may *renew* its request for judgment as a matter of law..." (emphasis added). Fed. R. Civ. P. 50(b). A Rule 50(b) motion is a renewal of a Rule 50(a) motion. *See Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1245 (11th Cir. 2001). This Court repeatedly has made clear that any renewal of a motion for

judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of the evidence and prior to the case being submitted to the jury. *See e.g., Shannon v. BellSouth Telecomms., Inc.*, 292 F.3d 712, 717 n.3 (11th Cir. 2002); *Middlebrooks*, 256 F.3d at 1245 (11th Cir. 2001).[10]

As this Court stated in *Middlebrooks*, a Rule 50(a) motion for judgment as a matter of law "can be renewed after trial under Rule 50(b), but a party cannot assert grounds in the renewed motion that it did not raise in the earlier motion." *Middlebrooks*, 256 F.3d at 1245 (citation omitted). This rule ensures "that opposing counsel will not be 'am-

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[10] Rule 50(b) provides:

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:
  (A) allow the judgment to stand,
  (B) order a new trial, or
  (C) direct entry of judgment as a matter of law; or
(2) if no verdict was returned;
  (A) order a new trial, or
  (B) direct entry of judgment as a matter of law.

Fed. R. Civ. P. 50(b).

bushed' or 'sandbagged' regarding the sufficiency of the evidence adduced at a point in the trial proceedings when it is too late to address possible insufficiencies. The purpose of Rule 50(b) . . . [is] 'to avoid making a trap' out of a motion for JNOV." *Crawford v. Andrew Sys., Inc.*, 39 F.3d 1151, 1153-54 (11th Cir. 1994) (quoting *Sims' Crane Servo v. Ideal Steel Prod., Inc.*, 800 F.2d 1553, 1557 (11th Cir. 1986).

Given the purpose and renewal nature of a Rule 50(b) motion, this Court also has instructed that a district court does not have the authority under Rule 50(b) to rule *sua sponte* on issues not raised by the parties. *Crawford*, 39 F.3d at 1154 ("Just as we would not permit defendants who had made no previous motion to ask the court to rule on the legal sufficiency of the evidence once a verdict had been returned against them, we cannot permit the district court to so rule *sua sponte*.").[11] In this case, after the jury rendered its ver-

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[11] This rule is consistent with those of our sister circuits. *See American and Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 160 (6th Cir. 1997) ("The opinion below explicitly states that the Magistrate found the *Garden City* decision himself and *sua sponte* relied on it as a basis for granting JNOV. This action is in contravention of the dictates of Fed. R. Civ. P. 50(b) and for that reason must be reversed."); *Murphy v. City of Long Beach*, 914 F.2d 183, 185-86 (9th Cir. 1990) (concluding that "[f]lor the same reasons a party may not seek a JNOV on grounds not alleged in their motion for directed verdict, a district court may not enter a JNOV on grounds not asserted in a party's motion for directed verdict"); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989) (reversing district court's decision to grant JNOV where that decision was based on grounds other than those advanced in the party's motion); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 171-72 (5th Cir. 1985) (reversing a district court's decision grant-

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dict, the district court *sua sponte* became concerned with an evidentiary issue whether any one defendant was both a common carrier and Aydin's employer not raised by the parties prior to submission of the case to the jury. We recognize that the district court did request and allow further, post-judgment briefing on the issue. Nonetheless, the district court ultimately granted judgment as a matter of law based upon a lack of evidence regarding a factual issue never raised by any defendant before the trial, and never addressed by anyone in any way before submission of the case to the jury. This is precisely the type of post-verdict "trap" that Rule 50(b) is designed to avoid.

Accordingly, we conclude that the district court lacked authority to grant a Rule 50(b) judgment on a ground not raised by the parties prior to the submission of the case to the jury. We therefore vacate the district court's Rule 50(b) judgment as a matter of law in favor of the defendants and reinstate the jury's verdict in favor of the plaintiff Doe.

While this Rule 50(b) issue is easily resolved by our precedent, the next issue is not. The defendants' cross-appeal raises the important issue of whether a cruise line, as a common carrier, is strictly liable for crew member assaults on its passengers during transit. Accordingly, we must navigate through considerable precedent about the duty of common carriers to protect and safely transport their passengers

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ing JNOV on a ground not advanced by the party's motion as an abuse of the court's discretion and a violation of the precepts of Rule 50(b)). As an example of how Rule 50(b) should be applied, the Advisory Committee's Notes on Rule 50(b) reference the Third Circuit's *Kutner Buick* decision. *See* Fed. R. Civ. P. 50(b) advisory committee's note.

and common carriers' corresponding liability for crew member assaults.

C. Liability for Crew Member Assaults

1. Supreme Court

As to the issue of common carriers' special duty to their passengers, there are only three Supreme Court decisions that bear on the issue. *New Jersey Steam-Boat Co. v. Brockett*, 121 U.S. 637, 7 S. Ct. 1039 (1887); *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18, 12 S. Ct. 109 (1891); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959). The parties cite these same cases but disagree about their import. We thus begin by analyzing these three decisions.

In 1887, the United States Supreme Court first addressed crew member assaults against ship passengers. In *Brockett*, the passenger was improperly "abaft the shaft," an area of the ship forbidden to "deck passengers." 121 U.S. at 1040, 7 S. Ct. at 644. A crew member violently removed the passenger from the forbidden area, dislocated his shoulder, and used unnecessary and excessive force. 121 U.S. at 1042. The Supreme Court upheld the jury's verdict compensating the passenger for his injuries. The Supreme Court concluded that, despite the passenger's presence in a forbidden area, if the passenger's injuries "were directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them, [the passenger] is not precluded from claiming the benefit of the contract for safe transportation." *Brockett*, 121 U.S. at 645, 7 S. Ct. at 1041. Rather, the passenger was entitled "to protection against the misconduct or negligence of the carrier's servants." *Id.*

In *Brockett*, the Supreme Court further stated that the "misconduct or negligence" of the carrier's servants "while

transacting the company's business, and when acting within the general scope of their employment, is of necessity to be imputed to the corporation." *Id.* "[I]t makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done in the course of his servant's employment." *Id.* (quotation marks and citation omitted).

This principle, according to the Supreme Court in *Brockett*, is "peculiarly applicable as between carriers and passengers; for. . . *a common carrier* is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, *and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract*." *Id.* at 645-46, 7 S. Ct. at 1041 (citation omitted) (emphasis added).

In reaching these conclusions in a ship case, the Supreme Court in *Brockett* relied exclusively upon prior decisions involving trains, and in effect, treated a ship as a common carrier similar to a train.[12] As shown here and later in this opinion, the federal maritime law essentially relies upon, and incorporates, the federal common law governing a common carrier's liability as its liability standard for crew member assaults on passengers.

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[12] In this case, the parties do not dispute that a cruise ship is considered a common carrier under federal maritime law. *See Shultz v. Florida Keys Dive Center*, 224 F.3d 1269, 1273 (11th Cir. 2000) (describing cruise ships as common carriers); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984) (same). Rather, they dispute the standard of care owed by ship defendants, as common carriers, to their passengers.

Given *Brockett*'s reference to a duty of absolute protection against crew member misconduct, some courts subsequently read *Brockett* as not allowing a ship-employer to defend an assault claim on the basis that the crew member was acting outside the scope of his employment. *See, e.g. Pacific S.S. Co. v. Sutton*, 7 F.2d 579,580 (9th Cir. 1925) (citing Brockett for proposition that "scope of employment" is not required); *Forrester v. Southern Pac. Co.*, 134 P. 753, 774-75 (Nev. 1913) (same). In fact, *Brockett* is ambiguous on this issue because it contains conflicting formulations and leaves open to interpretation whether the wrongful act at issue necessarily must be within the "scope of the employment," or merely in the "course of employment."

In any event, a few years later the Supreme Court applied and clarified Brockett in another common carrier case, *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18, 12 S. Ct. 109 (1891). *Jopes* involved a conductor's shooting of a train passenger. The Supreme Court in *Jopes* appears to have removed any scope-of employment requirement and concluded that a common carrier is absolutely liable for unlawful assaults by its employees against its passengers. In *Jopes*, the Supreme Court quoted *Brockett*'s rule that "a common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment." 142 U.S. at 25, 12 S. Ct. at 111 (quoting *Brockett*, 122 U.S. at 637, 7 S. Ct. at 1039). But after discussing *Brockett*, the Supreme Court in *Jopes* noted that "courts hold that the liability of a common carrier to his passengers for the assaults of his employees is of a most stringent character, far greater than that of ordinary employers for the actions of their employes [sic]." *Jopes*, 142 U.S. at 26, 12 S. Ct. at 112. In *Jopes*, the Supreme Court then cited a legal treatise for the proposition that a common carrier is "bound absolutely to see to it that no unlawful as-

sault or injury is inflicted upon [passengers] by their own servants." *Id.* (citation omitted).

More importantly, in *Jopes*, the Supreme Court further explained that the defense most often raised by an employer in a case involving an employee's assault upon a passenger was that the employee's act "was a wanton and willful act on his part, outside the scope of his employment, and therefore something for which his employer was not responsible." *Id.*, 142 U.S. at 27, 12 S. Ct. at 112. The Supreme Court acknowledged that "if the act was of that character, the general rule is that the employee alone, and not the employer, is responsible." *Id.* However, the Supreme Court in *Jopes* continued, "*[b]ut owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of the employment.*" *Id.* (emphasis added).[13]

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[13] This strict liability of a common carrier for employee assaults on passengers is premised historically in part upon the entrustment of passengers' personal safety to the common carrier. *Craker v. Chicago & Northwestern Ry. Co.*, 36 Wis. 657, 671 (1875) ("passengers of necessity commit to [the officers of a common carrier] their safety and comfort in *transitu*"); *Goodard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 213-14 (1869) (noting of common carriers that "[t]o their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they be competent" and further that "[t]he carrier's obligation is to carry his passengers safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to

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The Supreme Court in *Jopes* further stated that this liability rule is extremely broad and encompasses unlawful acts plainly not done "in furtherance of the carrier's business" as follows:

> Recent cases state this liability in the broadest and strongest language; and, without going beyond the actual decisions, it may be said that the carrier is liable for every conceivable wrongful act done to a passenger by its train hands and other employees while they are engaged in transporting him, no matter how willful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have been done in furtherance of the carrier's business.

Id., 142 U.S. 26, 12 S. Ct. 112 (citation and quotation marks omitted).

In both *Brockett* and *Jopes*, the Supreme Court spoke of common carrier liability in general, and was unconcerned with whether the specific mode of transport was a ship or a train.[14] As noted earlier, *Brockett*, a ship case, cited and dis-

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his servants, the law holds him responsible for the manner in which they execute the trust.").

[14] *See* Discussion on this point in Philip H. Budwick, "Strict Liability or Negligence: What Standard of Care Applies When Crewmembers Assault Passengers on Cruise Ships?" 19 Tul. Mar. L.J. 353, 358 (1995) ("Because the *Brockett* Court cited several railroad cases for authority and the *Jopes* Court cited *Brockett*, it is reasonable to suggest that the rule in *Jopes* also applies to passenger ships because both are considered common carriers.").

cussed train cases. In turn, *Jopes*, a train case, cited and discussed *Brockett*.[15]

After noting in Jopes that a common carrier is liable for its employee's assault on a passenger outside the scope of his employment, the Supreme Court then dealt with the narrow issue of whether an employee's conduct must be unlawful before it triggers this stringent liability imposed on the common carrier employer. The Supreme Court concluded that if the conductor-employee's shooting the passenger was in self-defense and therefore lawful, the employee was not liable and in turn the common-carrier employer was not liable. *Id.*, 142 U.S. at 27, 12 S. Ct. at 112.[16]

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[15] The Supreme Court continues to shape its federal maritime law from its decisions about common carriage involving trains. *See Norfolk Southern R. Co. v. Kirby*, 125 S. Ct. 385, 389 (2004) (deriving rule in maritime case from railroad common carrier case) (citing *Great Northern R. Co. v. O'Connor*, 232 U.S. 508, 34 S. Ct. 380 (1914)).

[16] After *Jopes*, numerous courts in both ship cases and train cases have concluded that a common carrier is strictly liable for assaults by its employees against passengers. *See, e.g Matthews v. Southern Ry. Sys., 157* F.2d 609, 610-11 (D.C. Cir. 1946) (stating that a "common carrier is required to protect its passengers against assault or interference with the peaceful completion of their journey."); *Pullman Co. v. Hall*, 46 F.2d 399, 404 (4th Cir. 1931) (noting exception to general liability rule and holding common carrier liable to passenger for a servant's assault); *Pacific S.S. Co. v. Sutton*, 7 F.2d 579, 580 (9th Cir. 1925) (steam ship company has duty "to carry safely and to protect its passenger from violence and insult committed by its own servants."); *Kansas City S. Ry. Co. v. Willsie*, 224 F. 908, 910 (8th Cir. 1915) (discussing "the absolute nature of the carrier's duty to protect the passenger from the as-

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It is noteworthy that *Jopes* relied upon the carrier-passenger relationship and the "peculiar circumstances which surround the carrying of passengers." *Id.* A common carrier's strict liability to a passenger for crew member assaults during transit rests upon its special implied duty of protection and safe transport that it owes as a common carrier through its employees to its passengers, and not for the reason that the act is incident to a duty within the scope of the crew member's employment. *See, e.g. Kansas City S. Ry. Co. v. Willsie*, 224 F. 908, 911 (8th Cir. 1915) (acknowledging "the absolute nature" of the carrier's duty to protect passengers from assaults by its employees and stating that "[t]he carrier is liable in such cases because the act is violative of the duty and a breach of the obligation it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment"). In other words, the rationale for imposing strict liability on the common carrier employer is the carrier-passenger relationship and the corresponding existence of an implied duty of protection and safe transport free from assault by the carrier's employees during transit. In terms of tort liability, this be-

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saults and insults of its own servants during the transit"); *Marks v. Alaska S.S. Co.*, 127 P. 1101, 1101 (Wash. 1912) (ship owner owed to passenger "a duty of absolute protection from the assaults and aggressions of it servants, and the rule is well-nigh universal that the carrier cannot plead as a defense that the servant acted outside the scope of his employment."); *see also The Minnetonka*, 146 F. 509, 513 (2nd Cir. 1906) (noting, where a crew member stole a ship passenger's jewelry, that the liability of the vessel for the willful torts of its crew is "well established").

comes, in effect, a special non-delegable duty owed by the carrier to the passenger.[17]

As plaintiff points out, a comment to the *Restatement (Second) of Agency* explains how a duty to protect may be imposed by law by virtue of and as incident to the carrier-passenger relationship, as follows:

> A master or other principal may be in such relations to another that he has a duty to protect, or to see that due care is used to protect, such other from harm although not caused by an enterprise which has been initiated by the master or by things owned or possessed by him. *This duty* may be created by contract, as where one agrees to protect another, or *may be imposed by law as incident to a relation voluntarily entered into, as the relation of carrier and passenger*, or by statute. . . . [T]he fact that the one to whom the performance of the duty is delegated acts for his own purposes

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[17] Defendants argue that the district court's dismissal of Doe's breach-of-contract claims makes it impossible for her to recover. While it is the contract for safe transportation that creates an implied duty on the part of the common carrier to protect and safely transport its passengers, the "breach of the carrier's duty is a maritime tort." *Kornberg*, 741 F.2d at 1334 (11th Cir. 1984) (citation and quotation marks omitted); *see also Nadeau v. Costley*, 634 So. 2d 649, 653 (Fla. Dist. Ct. App. 1994) (concluding that the breach of a cruise line's duty to protect its passengers due to a crew-member assault is actionable "in tort (strict vicarious liability) or contract (breach of contract of carriage based on an intentional assault)").

> and with no intent to benefit the principal or master is immaterial.

Restatement (Second) of Agency § 214 cmt. e (1958) (emphasis added).[18]

Further, we reject the defendants' claim that the Supreme Court abandoned the *Jopes* rule in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406 (1959). In *Kermarec*, the plaintiff was not a passenger, but was visiting a crew member. While on board the ship, the plaintiff fell on a staircase allegedly due to the improper way a runner was attached to the stairs. The plaintiff sued for personal injury due to the ship owner's negligence. *Id.* at 626-27, 79 S. Ct. at 407-08. The district court in *Kermarec* concluded that the ship owed a lower standard of care to the plaintiff as a "gratuitous licensee" under the laws of New York. *Id.* at 629, 79 S. Ct. at 409.

The Supreme Court in *Kermarec* decided that admiralty law need not import the land-based common law distinctions between "invitees" and "licensees," *Id.* at 631, 79 S. Ct. at 410, and concluded "that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632, 79 S. Ct. at 410. In analyzing the ship's liability to the visitor, the Supreme Court in *Kermarec* also stated that, "[i]t is a settled principle of maritime law that a shipowner owes a duty of

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[18] In this same comment to the *Restatement (Second) of Agency*, the American Law Institute also provided the following illustration: "P, a railroad, employs A, a qualified conductor, to take charge of a train. A assaults T, a passenger. P is subject to liability to T." *Restatement (Second) of Agency* § 214 cmt. e, illus. 3 (1958).

exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." *Id.* at 630, 79 S. Ct. at 409.

While this reasonable care language in *Kermarec* is broad, the Supreme Court was answering only a narrow question of law regarding whether the distinction between "licensees" and "invitees" imposed a *lower* standard of care on ship owners in a slip-and-fall case.

More importantly, *Kermarec* did not involve an assault or any intentional tort committed by a crew member on a passenger. Rather, *Kermarec* was a common, garden variety negligence case no matter how it is characterized. Indeed, *Kermarec* addressed the standard of care owed by common carriers in a situation where a person sustained personal injuries due to the physical condition of the ship. Further, *Kermarec* did not cite or discuss *Brockett* or *Jopes*. Quite simply, there is no indication in *Kermarec* that the Supreme Court intended to eliminate the more stringent rule in *Jopes* imposing liability on a common carrier for its employees' assaults of passengers.[19]

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[19] Earlier we noted that Section 214 of the *Restatement (Second) of Agency* supports our conclusion regarding common carrier liability for crew member assaults. Likewise, the tentative draft of the *Restatement (Third) of Agency*, in the corresponding section states: "A principal required by law to protect another cannot avoid liability by delegating performance of the duty to another, whether or not the delegate is an agent." *Restatement (Third) of Agency* § 7.06 (Tentative Draft No. 5, 2004). The relevant comment notes that the section "states the basic tort-law principle that a principal may be subject to liability to a third person when the principal is under a duty to protect that person. The principle is often termed one of "nondelegable" duty. . ." *Id.* § 7.06, cmt. a. Further, the

[Footnote continued on next page]

Although we agree with the defendants that the age of the *Brockett* and *Jopes* decisions and the intervening decisions in *Kermarec* suggest that the Supreme Court might well reconsider its former rulings were an opportunity to arise, the defendants fail to persuade us that *Kermarec* overruled *Brockett* and *Jopes*, either explicitly or implicitly. Instead, we agree with Doe that *Brockett* and *Jopes* represent the current state of the controlling federal law as to crew member

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Reporter's Notes under this section specifically apply the same rule as we do to ship owners' liability for their crew's misconduct against passengers:

> In admiralty cases, it was long assumed that a ship owner was subject to liability for its employees' misconduct against passengers. *See New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887) (ship owner liable when employee forcibly removed passenger from area of ship); *New Orleans & N.E.R.R. Co. v. Jopes*, 142 U.S. 18 (1891) (extending owner's strict liability under Brockett to circumstances in which employee acted outside scope of employment, as by shooting passenger). In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959), the Court held that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances." *Kermarec* did not overrule *Brockett* or *Jopes*, however, and involves not an employee's tort against a passenger but a passenger's fall down a defectively-constructed staircase.

Id., note b.

assaults on passengers.[20] Our precedent, as well as the decisions of other circuits, support this conclusion.

2. Eleventh Circuit

While we can locate no post-*Kermarec* decision in our Circuit involving a crew member assault on a passenger, there is a slip-and-fall decision that mentions in dicta "the unconditional responsibility" a common carrier has for its employees' misconduct. *Tullis v. Fid. & Cas. Co. of New York*, 397 F.2d 22, 23 (5th Cir. 1968).[21] In *Tullis*, this Court concluded that negligence was the applicable liability standard for the slip-and-fall in that case and cited *Kermarec*. This Court in *Tullis*, however, also noted that in an admiralty action involving liability to ship passengers, "[t]he liability

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[20] Interestingly, our reading of the rules enunciated in *Brockett* and *Jopes* is consistent with the current congressional direction on the issue before us. In 1996, Congress amended 46 U.S.C. App. § 183c, which forbids a vessel owner or operator from contractually limiting negligence liability, to include a section allowing the vessel to limit its liability for the infliction of emotional distress. Pub.L. 104-324, § 1129(b). However, Congress specifically provided that such contractual limitations on liability could not limit liability for distress "intentionally inflicted by a crewmember or the manager, agent, master, owner or operator." 46 U.S.C. App. § 183c(b)(1)(C). The statute further provides that "[n]othing in this subsection is intended to limit the liability of a crewmember or the manager, agent, master, owner, or operator of a vessel in a case involving sexual harassment, sexual assault, or rape." 46 U.S.C. App. § 183c(b)(2).

[21] In the case of *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

basis is negligence *with the only apparent exception being the unconditional responsibility of the carrier for the misconduct of the crew toward the passengers*." *Id.* at 23. (emphasis added)

Our other slip-and-fall cases apply the *Kermarec* standard of reasonable care under the circumstances. *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990) (passenger tripped over metal threshold cover in a doorway); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989) (passenger slipped and fell in a cruise ship disco). A fourth decision also involves defects in the ship's physical condition and adopts *Kermarec*'s negligence standard. *Kornberg*, 741 F.2d at 1334 (11th Cir. 1984) (in case involving failure of cruise ship's sanitary system, court stated "[a] carrier by sea. . . is not liable to passengers as an insurer, but only for its negligence") (citing *Kermarec*).[22] None of these four physical-condition cases cites *Jopes* or *Brockett*, and none involves a crew member assault on a passenger.

In sum, while our precedent applies *Kermarec*'s negligence standard in slip-and-fall and other physical condition cases as did *Kermarec* itself, our decision in *Tullis* acknowledged the "unconditional responsibility" exception for crew

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[22] Defendants' reliance on *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975), is misplaced. There, the defendant was the private owner of a pleasure craft, not a common carrier for hire, and the plaintiffs were injured by an improperly secured fuel tank and not by an assault. At best, *Gibboney* stands for the proposition acknowledged above that our Circuit applies a reasonable care standard in cases involving alleged defects in a vessel's physical condition.

member misconduct toward a passenger.[23] Our precedent thus does not, and indeed could not, alter *Jopes*' strict liability rule for such assaults.

3. Other Circuits

Only the Ninth Circuit has squarely answered the question of whether, post-*Kermarec*, a cruise line, as a common carrier, remains strictly liable for crew member assaults on passengers. *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993). As explained below, the Ninth Circuit concluded that *Kermarec* did not overturn the general maritime rule that a ship, like other common carriers, is absolutely liable for crew member assaults on its passengers during transit. *Id.* at 292.

In *Morton*, the plaintiff was alone in her cabin when a crew member delivered wine and raped her.[24] The plaintiff

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[23] The district court in this case and another district court in Florida both concluded that *Kermarec* did not overturn the rule in *Brockett* and *Jopes* that a common carrier is vicariously liable for crew member assaults on passengers. *See Doe v. Celebrity Cruises*, 145 F. Supp.2d 1337, 1342 (S.D. Fla. 2001) (concluding that the Eleventh Circuit would adopt the "majority view" that *Kermarec* did not change the strict or vicarious liability rule for crew member assaults and stating that "[t]his majority view makes the most sense because it limits *Kermarec* to its facts, while implicitly recognizing that Supreme Court cases such as *Brockett* and *Jopes* have not been overruled."); *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1318 (M.D. Fla. 2002) ("*Kermarec* is distinguishable on its facts and absent binding Eleventh Circuit precedent, the majority rule is that a common carrier, such as a cruise line, is vicariously liable for the intentional torts of its employees.") (citing *Doe*, 145 F. Supp.2nd at 1341-45).

sued, asserting "absolute liability" on the part of the cruise line for crew member assaults on passengers. *Id.* at 290. The plaintiff conceded that she was "unable to show any negligence by [the defendant cruise line] in hiring or supervising" its crew member. *Id.* The district court determined that the strict liability standard for assaults was "superseded or over ruled by *Kermarec*." *Id.*

Reversing, the Ninth Circuit determined that "*Kermarec* cannot be read to overrule" the maritime tort principle that a common carrier owes a duty to protect passengers from assaults by its crew members and is absolutely liable for such assaults. *Id.* at 292. The Ninth Circuit noted that this absolute liability rule "for crew member assaults cannot be traced to obsolete concepts," but that "it is a widely adopted rule that common carriers owe such an absolute duty to their passengers." *Id.* at 291-92 (citing *St. Michelle v. Catania*, 250 A.2d 874, 876-78 (Md. 1969) (carrier vicariously liable for assaults committed by employees even outside their employment during the contract for transportation); *Whittle v. Southern Bell Tel. & Tel. Co.*, 410 S.E.2d 575, 575 (S.C. Ct. App. 1991) (same); *Nazareth v. Herndon Ambulance Serv., Inc.*, 467 So. 2d 1076, 1078 (Fla. Dist. Ct. App.) (same), *review denied* 478 So. 2d 53 (Fla. 1985)).

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[24] In *Morton*, as in this case, the main factual dispute was over consent. The defendants claimed that the crew member was delivering milk and the passenger invited him in for wine and seduced him. The passenger alleged that the crew member appeared at her door with a bottle of wine, said he thought she would like to sample some, and raped her. 984 F.2d at 290.

The Ninth Circuit in *Morton* also relied upon this observation, by a leading torts treatise, explaining the non-delegable duty of protective care:

> Where the deliberate or willful wrong was not done to further the master's business the tendency has been to deny vicarious liability, but here too there have been many qualifications. *The relationship between master and plaintiff may be such as to put on the master a duty of protective care that he may not delegate.* Thus a carrier is liable to its passengers for assaults by employees prompted by purely personal motives. 5 Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, *The Law of Torts* § 26.9, at 53 (2d ed. 1986).

Morton, 984 F.2d at 292 (emphasis added).[25]

The defendants argue that a circuit split is created by the First Circuit's decision in *Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988), and the Second Circuit's deci-

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[25] In reaching its conclusions, the Ninth Circuit in *Morton* also relied heavily upon its own 1925 decision in *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925). *Morton*, 984 F.2d at 290-91. In Sutton, two crewmen sexually assaulted a female passenger. The Ninth Circuit concluded that the defendant ship as a common carrier owed to plaintiff "a duty of absolute protection from the assaults and aggressions of its servants" and stated that "the rule is well nigh universal that the carrier cannot plead as a defense that the servant acted outside the scope of his employment." *Sutton*, 7 F.2d at 580 (internal quotations and citations omitted).

sion in *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2nd Cir. 1914). We disagree and explain why.[26]

In *Muratore*, the First Circuit is equivocal, but appears to have followed the absolute liability rule. There, crew photographers harassed the plaintiff passenger, disregarded her request not to be photographed, and repeatedly took her picture. *Muratore*, 845 F.2d at 349-50. The First Circuit rejected the defendant ship's contention that "even if the photographers' conduct constitutes intentional infliction of emotional distress, defendant cannot be held legally responsible for the photographers' conduct." *Id.* at 353. Affirming the ship's vicarious liability, the First Circuit concluded, "a maritime carrier has *an unconditional responsibility* for the mis-

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[26] The defendants also rely upon two Fifth Circuit decisions, *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307 (5th Cir. 1988), and *Smith v. S. Gulf Marine Co. No. 2*, Inc., 791 F.2d 416 (5th Cir. 1986). Neither decision, however, involves a crew member assault on a passenger, and both are otherwise quite different from this case. Indeed, *Smith* dealt with a slip-and-fall aboard a vessel chartered specially to transport workers to their work site. Although applying the *Kermarec* "reasonableness" standard in *Smith*, the Fifth Circuit reversed judgment for the defendant ship-owner, and held it liable to plaintiff as a matter of law. *Smith*, 791 F.2d at 421.

Jackson Marine is even more inapposite as it involved fraud by a salvage boat captain against the owner of a damaged ship, and in no way involved a common carrier or a passenger. In *Jackson Marine*, the Fifth Circuit concluded that the ship owner was vicariously liable for the captain's torts, albeit with the requirement that they be committed "within the scope of the captains normal duties and employment." 845 F.2d at 1310. Neither *Smith* nor *Jackson Marine* assist us in determining a cruise line's liability for crew member assaults on passengers.

conduct of its people toward the passengers." *Id.* (emphasis added) (internal quotations and citation omitted).[27]

We also agree with Doe that the Second Circuit in *Rivers* did not necessarily adopt a negligence/scope-of-employment rule for crew member assaults on passengers. In *Rivers*, a crew member hid in the plaintiffs cabin, waited for her return, and attacked her. After a verdict for the plaintiff, the defendant appealed, claiming error because the district court had charged the jury "that the defendant was bound to an obligation 'of the very highest degree of care to protect its passengers.'" 211 F. at 298. The district court, however, had

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[27] Despite this clear statement in the liability section, the First Circuit's *Muratore* decision contains a separate section entitled "IV. COMPENSATORY DAMAGES." fu that damages section, the First Circuit discussed the defendant's concern "that the lower court made repeated reference of the carrier's higher degree of care." *Id.* The First Circuit then cited *Kermarec* and stated that, "it is axiomatic in maritime law that a carrier owes a duty of exercising reasonable care towards its passengers under the circumstances." *Id.* Later, the First Circuit cited *Kermarec* again and stated that the duty of exercising reasonable care under the circumstances is "the appropriate legal standard." *Id.* at 354. The First Circuit concluded that the district court's use of the language "special duty" in its jury charge was not prejudicial to the defendant and affirmed the award of compensatory damages. *Id.* In the end, the First Circuit's *Muratore* decision at worst points in both directions: unconditional responsibility and reasonable care under the circumstances. We also note that a district court in Maine recently concluded that under *Muratore* a cruise line is unconditionally liable for a crew member's sexual assault of a passenger. *Peterson v. Scotia Prince Cruises, Ltd.*, 328 F. Supp. 2d 119, 122 (D. Me. 2004).

also instructed the jury that the defendant was not an absolute insurer against assaults and that a passenger could not recover unless there was some negligence by the carrier. *Id.* The district court also "pointed out the difference between an assault by an employee when carrying out the orders of his employer and a wanton one, committed when off duty." *Id.*

In affirming the verdict for the plaintiff, the Second Circuit in *Rivers* cited *Jopes* and *The Minnetonka*, and remarked that the district court had "instructed *more favorably* to defendant than some of the authorities indicate." *Rivers*, 211 F. at 298 (emphasis added). *The Minnetonka*, like *Jopes*, imposed a strict liability rule. Indeed, the Second Circuit in *The Minnetonka* stated that "[t]he archaic doctrine that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside the scope of his authority and thus releases his employer from liability was long ago renounced by the great preponderance of authority." 146 F. at 513.[28] Given *Rivers*'s reliance on *Jopes* and *The Minnetonka* for stating that the jury charge was more favorable to the defendant than indicated, we do not read *Rivers* as necessarily establishing a negligence/scope-of-employment standard for crew member assaults on passengers.[29] At worst, the import of *Rivers* is unclear.[30]

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[28] In *The Minnetonka*, the Second Circuit affirmed the verdict for the passenger against the steamship carrier for the value of jewelry stolen by a steward who came into the stateroom, reached over the passenger in her berth and seized the jewelry bag. 146 F. at 512-13.

[29] Post-*Kermarec* decisions in the Second Circuit, as in this Circuit, adopt a reasonable care standard for slip-and-fall lawsuits by passengers where no crew member assault is involved. *See e.g.*, *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63 (2nd Cir.

[Footnote continued on next page]

Having canvassed the relevant Supreme Court and circuit precedent, we now turn to the liability issues on appeal in this case.

4. Legal Standard Governing Doe's Claims

The principal liability issue is which standard governs the defendants' liability to its passenger Doe for crew member assaults: (1) strict liability or (2) reasonable care under the circumstances.

For the reasons we have detailed at some length, we conclude that the defendants owe a non-delegable duty to protect their passengers from crew member assaults and thereby safely transport their cruise passengers, that the Supreme Court's decisions in *Brockett* and *Jopes* remain binding precedent, that *Kermarec* did not overrule *Brockett* or *Jopes*, and thus that the district court did not err in concluding that the defendants are strictly liable for crew member assaults on their passengers during the cruise. We add that *Kermarec*'s reasonable care standard does not apply to a

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1988) (plaintiff fell down a flight of stairs); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2nd Cir. 1983) (plaintiff tripped over a stool in ship disco).

30 We read *Rivers* as affirming the verdict for the plaintiff primarily because, although the district court had improperly permitted the jury to apply a less stringent standard of care (*i.e.* negligence), the evidence at trial demonstrated the ship owner was still liable to the passenger even under the lower "negligence" standard of care. However, the district courts in New York have read *Rivers* as establishing a negligence standard. *York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159, 162 (S.D.N.Y. 1994); *Jaffess v. Home Lines, Inc.*, 1988 WL 42049, at *5 (S.D.N.Y. April 22, 1988).

crew member's sexual assault on a passenger. *Tullis*, 397 F.2d at 23.

We turn, then, to the defendants' alternative argument that even if the strict liability standard governs crew member assaults on passengers during a cruise, that standard cannot apply factually to this particular case because (1) the sexual battery occurred while Aydin was off duty and off the ship and (2) the special carrier passenger relationship was severed when Doe and Aydin left the ship's premises.

5. Carrier-Passenger Relationship Between Doe and Aydin

The case precedent establishes that, due to the special carrier-passenger relationship, the defendants had a non-delegable duty to protect and safely transport Doe during the cruise, and thus are liable if a crew member assaulted her during the cruise. There is no dispute that this carrier-passenger relationship has a temporal limit based on the duration of the cruise. This sexual battery occurred on July 19, 1999, and undisputedly fell within the seven-day time period of the cruise from July 17 to July 24, 1999.

The next issue is whether the common carrier-passenger relationship has a strict spatial limit so that the common carrier-passenger relationship was severed when Doe and Aydin left the ship's premises. For the reasons outlined in the jurisdiction section above, we conclude that the carrier-passenger relationship continued between the defendants and Doe during her interaction with Aydin in this scheduled port-of-call.

In this regard the defendants emphasize that Aydin was not only on shore, but also "off-duty." This argument ignores the defendants' "tipping system," an integral part of the carrier-passenger relationship that encouraged Aydin to socialize with and escort his assigned dinner passengers while off-duty in the ship's scheduled port-of-call. As discussed above, Doe was assigned to Aydin's dinner table each night,

and was provided envelopes for tipping Aydin. Aydin's job thus involved daily interaction with a particular set of passengers. Indeed, the defendants expressly permit socialization between crew members and passengers on shore at the Oasis. Aydin admits that his off-duty, on-shore interaction with his passengers enhances his tips. To some extent, defendants arguably have a pecuniary interest in off-duty crew members socializing with and escorting passengers in a port-of-call because it promotes the success of the defendants' tipping system as a way to pay Aydin for his services to the defendants.

It is further undisputed that on the very night in question Aydin, while on duty and serving in his role as a crew-member waiter, directed his dinner guest passengers to his favorite nightspot-the Oasis-within a short walking distance of the ship, and that Aydin was at the Oasis when Doe arrived. Although off-duty, Aydin admits escorting one of Doe's friends back to the ship before coming back to the Oasis and then escorting Doe ultimately back to the ship. While Aydin and Doe dispute whether he was taking her ostensibly to a bathroom first or to the park for sex, Aydin undisputedly had offered to help Doe in her distress. Aydin even referred to Doe as "his passenger," and there is ample evidence in the record that Doe allowed Aydin to escort her only because he was trusted as her waiter-crew member on the ship.

Accordingly, under all of the circumstances of this case, we cannot conclude that the interaction between Aydin and Doe is outside the scope of the on-going carrier-passenger relationship or, as explained earlier, the scope of the on-going cruise. Thus, when crew member Aydin sexually battered passenger Doe, the non-delegable duty owed by a common carrier to protect its passengers from crew member assaults during the cruise was breached.

6. Florida Law

While we believe that *Jopes* and *Tullis* are the controlling precedent and that we need not reach Florida law, we recognize that the district court premised its pre trial ruling partly on Florida law, which the defendants argue was erroneous. The defendants further assert that Florida decisions contradict the *Kermarec* decision, and therefore the district court should not have relied on them. The district court's order is actually unclear because it first seems to apply federal maritime law, but at the end appears to rely on Florida law for its strict liability ruling.

Nonetheless, to the extent the district court relied on Florida law, we find no reversible error as Florida law is entirely consistent with federal maritime law and imposes strict liability on a cruise line for crew member assaults on passengers.

For example, in *Nadeau v. Costley*, 634 So.2d 649 (Fla. Dist. Ct. App. 1994), the plaintiff passenger sued the crew member Costley and Carnival Cruise Lines, Inc., for damages from Costley's sexual assault of the plaintiff in her room. In concluding that the passenger had a cause of action against the defendant cruise line in tort (strict vicarious liability) and in contract, the Florida appellate court explained that "Florida holds a common carrier responsible for the willful misconduct of its employees during the entire contractual period, notwithstanding the fact that the employee's actions fall outside the scope of employment." *Id.* at 652-53.

In reaching this conclusion, the Florida appellate court in *Nadeau* actually analyzed the relevant federal precedent, including the First Circuit's *Muratore*, the Ninth Circuit's *Morton*, and the Second Circuit's Rivers. The Florida appellate court determined that the same strict liability principle "has been recognized by federal courts applying admiralty law." *Id.* at 652 (citing *Muratore* and *Morton*). The Florida appel-

late court in *Nadeau* discussed *Rivers* and determined that the language in *Rivers* requiring negligence on the part of the carrier was "dicta" and was presented as part of a jury instruction that the Second Circuit believed was "actually favorable" to the defendant common carrier. *Id.* at 652 & 652 n.5.

In *Nadeau*, the Florida appellate court ultimately concluded that "[a]t best, admiralty courts are split on the question of whether independent negligence on the part of the shipowner is required to hold the owner liable for an intentional assault by a crew member." *Id.*, at 652-53. Therefore, the Florida court in *Nadeau* determined (1) that it was "free to apply Florida law in the absence of controlling maritime precedent," (2) that under Florida law the common carrier was strictly liable for the assault, and (3) that "applying Florida law to the instant facts would in no way alter the uniformity of admiralty decisions." *Id.*

Other Florida appellate decisions apply the same strict liability rule for employee assaults in common carrier-passenger cases. *See, e.g., Pelot v. Atlantic Coast R. Co.*, 53 So. 937, 938 (Fla. 1910) (train case); *Nazareth v. Herndon Ambulance Serv., Inc.*, 467 So.2d 1076, 1078-79 (Fla. Dist. Ct. App. 1985) (ambulance common carrier case); *Commodore Cruise Lines, Ltd. v. Kormendi*, 344 So.2d 896 (Fla. Dist. Ct. App. 1977) (cruise line case).

Defendants argue that two Florida cases undermine Florida's strict liability rule, citing *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So.2d 488 (Fla. Dist. Ct. App. 1986), and *Riddle v. Aero Mayflower Transit Co.*, 73 So.2d 71 (Fla. 1954). This argument is unavailing. In *Rindfleisch*, the parties agreed that federal maritime law controlled, and thus the Florida appellate court did not apply Florida law at all. Further, *Rindfleisch* was a slip-and-fall case, and the Florida appellate court correctly applied *Kermarec*'s reasonable care standard. *Rindfleisch*, 498 So.2d at 490-91. In addition, the

Florida appellate court in Nadeau distinguished *Rindfleisch* and applied Florida law and a strict liability standard in a crew member assault case. *Nadeau*, 634 So.2d at 651 n.3 & 652. Thus, we conclude that *Nadeau* is more directly on point.

As to the second case, while *Riddle* did involve Florida law, it concerned "a common carrier in moving household goods," and the assault occurred in the plaintiff's home. 73 So.2d at 71. Accordingly, *Rindfleisch* and *Riddle* do not alter our conclusion (1) that Florida tort law imposes strict liability on cruise lines for crew member assaults on their passengers, (2) that as to this issue Florida law is consistent with federal maritime tort law, and (3) that to the extent the district court applied Florida law there is no reversible error in this case.

D. Sexual Assault Verdict

As stated above, the district court determined that the defendants were liable for Jane Doe's injuries if Aydin committed *either* a sexual assault or a sexual battery. Also, as outlined above, the jury concluded that Aydin committed a sexual battery, but not a sexual assault, on Doe.

To the extent the defendants argue that there is some conflict between the jury's verdicts, we conclude that no conflict existed between a finding that, as instructed, Aydin committed a sexual battery, but not a sexual assault.

As described earlier, the district court instructed the jury that the defendants were strictly liable if Doe proved sexual battery as follows:

> **Sexual Battery**
>
> On Plaintiff's claim for sexual battery, Defendants. . . are strictly liable to Plaintiff for sexual battery if Plaintiff shows, by the greater weight of the evidence, the following: That Baris Aydin, with his sexual organ, *pene-*

> *trated or had union* with the vagina of Plaintiff; *and*
>
> *That act was done without the consent of Plaintiff.*

(emphasis added). Therefore, to prove sexual battery, Doe had to prove only that Aydin had sexual intercourse with her (a fact that was not in dispute) and that she did not consent to the sexual intercourse; that is, if Doe did not consent to the sexual intercourse, Aydin was guilty of sexual battery. *See* Fla. Stat. ch. 794.011 (1) (h) & (5).

In contrast, as to the sexual assault, the district court instructed the jury as follows:

> **Sexual Assault**
>
> On Plaintiff's claim for sexual assault, Defendants. . . are strictly liable for sexual assault if Plaintiff shows, by the greater weight of the evidence, either:
>
> a) That Baris Aydin *intended to commit* a sexual battery on the person of Plaintiff; *and that the attempted act was done without the consent of Plaintiff*; or
>
> b) That Baris Aydin intended to cause Plaintiff to fear an immediate sexual battery or rape; *and that the attempted act was done without the consent of Plaintiff.*

(emphasis added). Thus, as charged, a jury would have to conclude that Aydin: (1) intended to commit a sexual battery and that the "attempted act" was done without Doe's consent; *or* (2) intended to cause Doe to fear an immediate sexual battery or rape and that the "attempted act" was done without Doe's consent. We readily conclude that the sexual battery and sexual assault charges, and the jury's verdict as to these charges, are in no way inconsistent.

First, a jury could reasonably have concluded that sexual assault charges were inapplicable because it was undisputed that Aydin had sexual intercourse with Doe, and, therefore, there was no "attempted act," only the completed act of sexual intercourse.[31] Furthermore, the jury could have viewed the "attempted act" language as necessarily related to the "intended acts" immediately preceding in the charge; that is, Aydin was not guilty of sexual assault because he did not attempt to: (1) commit a sexual battery (he in fact did commit a sexual battery); or (2) cause Doe to fear a sexual battery or rape.

Furthermore, the jury charges for sexual battery and sexual assault contain a simple, obvious difference, and, therefore, are not inconsistent. The sexual battery charge does not require that Aydin "intended" to engage in criminal conduct, whereas, the sexual assault charge requires that Aydin have the specific intent to engage in criminal conduct.

The defendants seize on this last difference and argue that because sexual battery does not have, as an element, any specific intent to engage in criminal conduct it should not be considered an intentional tort. Therefore, according to the defendants' argument, strict liability is only for intentional torts and thus they should not be held strictly liable for Aydin's actions. The defendants' argument is flawed for several reasons.

First, the district court's sexual battery charge was consistent with Florida's criminal statute defining sexual battery and Florida Pattern Jury Instruction 11.4, in that it required a

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[31] Aydin testified at some length about the sexual encounter. Specifically, he testified that, "I was still touching her body, vagina, and I went to kiss her again, we were still kissing, and then I put my penis into her vagina."

showing of only (1) sexual penetration and (2) a lack of consent.[32] Furthermore, under Florida law, sexual battery is a general intent crime and does not require that a defendant act with specific intent. *See Coler v. State*, 418 So.2d 238, 239 (Fla. 1982) ("State of mind is not a material fact in a sexual battery charge, nor is intent an issue."); *Killian v. State*, 730 So.2d 360, 362 (Fla. Dist. Ct. App. 1999); *Jackson v. State*, 640 So.2d 1173, 1174 (Fla. Dist. Ct. App. 1994); *see also Askew v. State*, 118 So.2d 219, 222 (Fla. 1960). Although the defendants correctly point out that specific intent is not required under sexual battery, the defendants incorrectly conclude that this means that sexual battery is not an intentional tort.

Florida law equates sexual battery with an intentional tort. *See Doe v. Young*, 656 So.2d 569, 570 (Fla. Dist. Ct. App. 1995) (describing plaintiffs' claims as "the intentional torts of battery and sexual battery"); *see also Doe v. Evans*, 814 So.2d 370, 380 (Fla. 2002) (J., Wells, dissenting) ("Importantly, there are no allegations that the alleged conduct resulted in any physical injury or that an intentional tort such as sexual battery occurred"); *Scott v. Otis Elevator Co.*, 572 So.2d 902, 903 (Fla. 1990) ("This conclusion is supported by the definition of the intent necessary to establish an intentional tort. The intent with which tort liability is concerned is an intent to bring about a result which will invade the interests of another in a way that the law forbids.") (internal punctuation and citation omitted)). Furthermore, an intentional

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[32] Under Florida law, there are several types of sexual battery. For the purposes of this case we are concerned with sexual battery defined as the "oral, anal, or vaginal penetration by, or union with, the sexual organ of another. ..." Fla. Stat. ch. 794.011(l)(h), and "without [Doe's] consent. . . ." Fla. Stat. ch. 794.011(5).

tort is "[a] tort committed by someone acting with general or specific intent [and] [e]xamples include battery, false imprisonment, and trespass to land." Black's Law Dictionary at 1527 (8th Ed. 1999).

Second, the defendant draws the wrong distinction. The distinction is not between those torts that have some overt requirement of specific intent and those torts that do not. Rather, the proper distinction is between intentional torts and those torts based on negligence. *See City of Miami v. Sanders*, 672 So.2d 46, 47 (Fla. Dist. Ct. App. 1996) ("An assault and battery is not negligence for such action is intentional, while negligence connotes an unintentional act.") (quotation marks omitted); *Slawson v. Fast Food Enters.*, 671 So.2d 255, 258 (Fla. Dist. Ct. App. 1996) ("[T]he kind of harm sought to be avoided was an intentional assault, the oldest intentional tort."); *see also St. John v. Coisman*, 799 So.2d 1110, 1125 n.5 (Fla. Dist. Ct. App. 2001) (Sawaya, J., concurring in part, dissenting in part) ("Assault and battery are intentional torts as opposed to torts based on negligence."). For all the above reasons, it is clear that sexual battery is an intentional tort.

Finally, even assuming *arguendo* that sexual battery was not considered an intentional tort, the defendants' arguments still lack merit; that is, if a cruise ship can be held strictly liable for its crew members' intentional torts, a cruise ship can certainly be held strictly liable for other, lesser forms of crew member sexual assaults on passengers. We readily conclude that a sexual battery by a crew member is within that class of crew member assaults for which a ship, as a common carrier, is strictly liable to a passenger.[33]

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[33] Defendants did not appeal the denial of their motion for remittitur, but do appeal the denial of their motion for new trial, which

[Footnote continued on next page]

VI. CONCLUSION

For the above reasons, we REVERSE the entry of judgment for the defendants because the district court lacked authority to enter judgment under Rule 50(b) on a new ground not raised by any party prior to submission of the case to the jury. We further reinstate and AFFIRM the jury's verdict for the plaintiff and REMAND the case to the district court to enter final judgment on the jury's verdict for the plaintiff and against the defendants.

[Footnote continued from previous page]
was premised on erroneous evidentiary rulings. On appeal, the defendants acknowledge that the district court denied their motion for new trial as moot but defendants request that, if we set aside the Rule 50(b) motion granted in their favor, we then decide whether the evidentiary rulings warrant a new trial. Thus, we will review for an abuse of discretion the district court's evidentiary rulings and denial of a motion for a new trial. *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1247-48 (11th Cir. 2001). The defendants argue that they are entitled to a new trial because the district court erred by (1) not permitting the defendants to "truthfully disclos[e] the judicial position, title and background" of the Bermudian magistrate who heard the criminal case in Bermuda and appeared as a defense witness at trial; (2) precluding defendants "from apprizing the jury of the outcome of the Bermuda court proceedings"; and (3) "allowing Doe to wear her military uniform during trial." After review, we conclude that the district court did not abuse its discretion in these rulings during trial, and defendants are not entitled to a new trial.

APPENDIX B

Jane DOE, Plaintiff,

v.

CELEBRITY CRUISES, Zenith Shipping Corp., et al., Defendants.

No. 00-2523-CIV.

United States District Court
S.D. Florida.

Feb. 26, 2001

Gerhardt Adam Schreiber, Mary Lou Rodon-Alvarez, Schreiber Rodon-Alvarez, Coral Gables, FL, George J. Tsimis, Stephan Skoufalos, Richard M. Ziccardi, Skoufalos Llorca & Ziccardi, Stamford, CT, for plaintiff.

Ralph O. Anderson, Hicks Anderson & Kneale, Miami, FL, Jeffrey Bradford Maltzman, Darren Wayne Friedman, Kaye Rose & Maltzman, Miami, FL, for defendants.

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

GOLD, District Judge.

THIS CAUSE is before the court upon the motions to dismiss (DE # 8, 27) filed by defendants Celebrity Cruises ("Celebrity"), Apollo Ship Chandlers ("Apollo"), and Zenith

Shipping Corp. ("Zenith").[1] Defendant M/V Zenith has not filed a motion to dismiss, and it appears from the record that the individual defendant, Baris Aydin ("Aydin"), never was served with a summons and copy of the complaint. The plaintiff, Jane Doe, filed a nine-count complaint against the defendants alleging as follows: count I, breach of contract of carriage (against Celebrity, Zenith, and M/V Zenith); count II, negligence (against Celebrity, Zenith, M/V Zenith, and Apollo); count III, sexual assault (against Celebrity, Zenith, M/V Zenith, Apollo, and Aydin); count IV, battery (against Celebrity, Zenith, M/V Zenith, Apollo, and Aydin); count V, intentional infliction of emotional distress (against Celebrity, Zenith, M/V Zenith, Apollo, and Aydin); count VI, negligent infliction of emotional distress (against Celebrity, Zenith, M/V Zenith, Apollo, and Aydin); count VII, negligent infliction of emotional distress (against Celebrity, Zenith, and M/V Zenith); count VIII, intentional infliction of emotional distress (against Celebrity, Zenith, and M/V Zenith); and count IX, breach of contract (against Celebrity, Zenith, and M/V Zenith). The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties, and the amount in dispute is over $75,000. The court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1333 insofar as this matter involves claims that come under the court's admiralty jurisdiction. The defendants seek to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). For the reasons discussed herein, the de-

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[1] Both motions to dismiss are identical. DE # 8 was filed by Celebrity and Apollo, and DE # 27 was filed by Zenith. Celebrity, Apollo, and Zenith are collectively referred to as "the defendants" throughout this order.

fendants' motions to dismiss are granted in part and denied in part.

Facts[2]

The M/V Zenith is a passenger vessel owned, managed, and operated by Celebrity and/or Zenith. Apollo provides crewing, manning, and other services for Celebrity's vessels. At all relevant times, Aydin, a Turkish resident, was a crew member of the M/V Zenith.

In 1999, the plaintiff purchased a passenger ticket for a seven-day cruise aboard the M/V Zenith from New York, New York to Bermuda and back to New York. The plaintiff boarded the M/V Zenith on July 17, 1999, and, on that day, the vessel departed to Bermuda. On July 19, 1999, the M/V Zenith anchored in the port of Hamilton, Bermuda, which was a scheduled port-of-call for the seven-day cruise. (Compl. at ¶ 14).

The plaintiff disembarked from the M/V Zenith with her friends and proceeded to go ashore at Hamilton. In the early morning hours of July 20, 1999, while in Hamilton with friends, the plaintiff began to feel ill. She accepted the assistance of crew member Aydin, who the plaintiff had recognized as a staff member from the M/V Zenith. (Compl. at ¶ 16). Instead of taking the plaintiff to the vessel, which was docked across the street, Aydin led the plaintiff away from her friends and to a nearby public restroom. (Compl. at ¶ 17). Despite the plaintiff's protests, Aydin proceeded to sexually assault and batter her. (Compl. at ¶¶ 18–20).

After the attack by Aydin, the plaintiff returned to the M/V Zenith and reported the incident to local authorities and

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[2] The following facts are derived from the allegations contained in the plaintiff's complaint.

the vessel's security department. The plaintiff saw the vessel's physician for treatment of her injuries and trauma, but she claims that the physician failed to examine her correctly, preserve evidence of the sexual assault, protect her from a sexually transmitted disease or pregnancy, or administer a rape kit. (Compl. at ¶ 22). The plaintiff further claims that Celebrity, Zenith, the doctor, and other crew members sought to protect the legal interests of the defendants and shield themselves from liability by failing to investigate the incident or properly collect and preserve evidence. (Compl. at ¶ 22, 23). Aydin was not disciplined by the other defendants, and he continued to work aboard the M/V Zenith until local law enforcement authorities took him into custody. (Compl. at ¶ 24).

Standard for Motion to Dismiss

To warrant dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil procedure, it must be "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Determining the propriety of granting a motion to dismiss requires courts to accept all the factual allegations in the complaint as true and to evaluate all inferences derived from those facts in the light most favorable to the plaintiff. *See Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994). The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low. *See Ancata v. Prison Health Svcs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (citation omitted); *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986). "[U]nless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the complaint should not be dismissed on grounds that it fails to state a claim upon which relief can be granted. *Sea Vessel,*

Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994) (citation omitted). Nevertheless, to survive a motion to dismiss, a plaintiff must do more than merely "label" his claims. *Blumel v. Mylander*, 919 F. Supp. 423, 425 (M.D. Fla. 1996). Moreover, when on the basis of a dispositive issue of law no construction of the factual allegations will support the cause of action, dismissal of the complaint is appropriate. *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

Analysis

The defendants make several arguments in support of their motions to dismiss. Their principal contention is that, as a matter of maritime law, they cannot be held strictly liable for Aydin's tortious conduct. The defendants also argue that they cannot be liable for the ship doctor's negligence because they had no duty to provide medical care nor to investigate Aydin's alleged assault. Finally, the defendants seek to dismiss the breach of contract claims by arguing that the law of admiralty will not imply a contractual provision guaranteeing a safe passage. Each of these points is addressed below.

I. Applicable Law

Because this case involves maritime torts, federal admiralty law controls. *See Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990). Even when, as here, the parties allege diversity of citizenship as a basis of subject matter jurisdiction, if admiralty jurisdiction also exists, federal maritime law governs the substantive issues in the case. *See id.* When neither a uniform statutory or judicially-created maritime rule provides an answer to a specific legal question, a court may apply state law, as long as application of the state law does not frustrate national interest in having uniformity in admiralty law. *See Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co.*, 207 F.3d 1247, 1251 (11th Cir. 2000).

II. Can Vicarious Liability Be Imposed for Aydin's Tortious Conduct?

In counts III, IV, V, and VI, the plaintiff seeks to hold the defendants vicariously liable for Aydin's sexual assault. The defendants seek to dismiss these counts by arguing that vicarious liability is an improper standard of care. They contend that cruise ship operators owe passengers "care which is reasonable under the circumstances." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). This standard is akin to a negligence standard, which requires some fault on the part of the cruise ship operator. For the reasons discussed in the following subsection, the court rejects the defendants' argument and agrees with the plaintiff's position that a cruise ship operator can be held vicariously liable for its employee's intentional torts.

A. The Circuits Are Split

Uncertainty exists among the courts as to whether the proper standard of care for a ship owner sued for an employee's intentional tort is strict liability or negligence. While most circuits that have addressed this issue find that ship owners should be held strictly liable for their employees' misconduct, one circuit, the Second, has required that negligence by the cruise ship be shown. The Eleventh Circuit has not yet addressed this issue.

The debate among the circuits stems from the case of *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Until *Kermarec* was decided, admiralty law was clear that a common carrier was strictly liable for its servants' misconduct against passengers, whether the act was committed within or outside the scope of the servant's employment. *See New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887) (holding that ship owner could be held vicariously liable for employee's forcible removal of passenger from area of ship); *New Orleans & N.E.R.R. Co. v. Jopes*, 142 U.S. 18 (1891) (expanding Brockett's strict

liability standard to include situations where servant acted outside scope of employment, such as by shooting passenger). *Kermarec*, however, became a source of confusion because, rather than applying a strict liability standard, the Court adopted a negligence test for holding ship owners liable. The Court stated that the "owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances." *Kermarec*, 358 U.S. at 632.

While *Kermarec* applied a different standard to determine a ship owner's liability, it did not overrule Brockett or Jopes, implicitly or explicitly. The *Kermarec* Court did not cite *Brockett* or *Jopes*, and all of the precedent relied on by the Court in *Kermarec* involved personal injuries aboard ships, not intentional torts by crew members. Also, unlike *Brockett* and *Jopes*, *Kermarec* did not involve a tort inflicted upon a passenger by a crew member; it involved a personal injury claim that arose from a visitor's fall down a defectively-constructed flight of stairs.

Only the Second Circuit has interpreted Kermarec broadly enough to eliminate vicarious liability for a crew member's intentional torts. According to district courts within the Second Circuit, whether a case involves an underlying intentional tort or negligent act, a ship owner can be held liable for its employee's conduct only if the owner did not exercise reasonable care under the circumstances. In *Jaffess v. Home Lines, Inc.*, 1988 WL 42049, No. 85 CIV 7365 (S.D.N.Y. Apr. 22, 1998), the court held that, where a crew member assaulted a passenger in the ship's elevator, the ship owner could not be held vicariously liable. *Id.* at *5. Instead, "some 'specific neglect' on the part of the ship owner must be shown before the ship owner can be held liable, even for an intentional assault." *Id.* Because the ship owner showed care in hiring, supervising, and segregating

employees from passengers, the court held that the owner was not liable for its employee's conduct. *Id.*; *see also York v. Commodore Cruise Line, Inc.*, 863 F. Supp. 159, 162 (S.D.N.Y. 1994) (applying *Kermarec* standard to case involving sexual and verbal assaults by crew member against passenger). As a result of these decisions, the *Kermarec* negligence standard of reasonable care applies to intentional torts by crew members within the Second Circuit.

In contrast to the Second Circuit, the First, Fifth, and Ninth Circuits (the only other circuits that have decided the issue) have adopted the standard of care urged by the plaintiff in this case and applied by the Supreme Court in *Brockett* and *Jopes*. These circuits hold ship owners vicariously liable for the willful misconduct of their crew members. For instance, in *Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988), the First Circuit upheld the district court's imposition of vicarious liability for the ship photographers' intentional harassment of the plaintiff. The First Circuit stated, "[A] maritime carrier has an 'unconditional responsibility for the misconduct of its people toward the passengers'." *Id.* at 353. Similarly, in *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307 (5th Cir. 1988), the Fifth Circuit held that a ship captain's fraud and misrepresentations could be imputed to the ship owner because "the general maritime law imputes to the principal the servant's acts committed within the scope of a servant's employment. . . ." *Id.* at 1310.

In *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993), the Ninth Circuit held that the ship owner was absolutely liable for the crew member's rape of a passenger. Significantly, the Ninth Circuit rejected the very same position adopted by the defendants in this case and the district courts of the Second Circuit—that *Kermarec* imposes a negligence standard in passenger assault cases. *Morton*, 984 F.2d at 291. According to the Ninth Circuit, *Kermarec* should be limited to its facts, which involve a personal injury

claim, not an intentional tort. *Id.* at 292. The court stated that, in passenger assault cases, "[I]t is a widely adopted rule that common carriers owe such an absolute duty to their passengers." *Id.* Thus, in the Ninth Circuit, *Kermarec*'s negligence standard is applied only to personal injury cases, while vicarious liability remains the rule for passenger assaults.

B. The Eleventh Circuit

According to the defendants, the Eleventh Circuit would apply the *Kermarec* standard to the facts of this case because it adopted *Kermarec* in *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989), and in subsequent cases, such as *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990). The defendants' argument is without merit because both *Keefe* and *Everett* involved negligence claims against ship owner's, not crew members' assaults upon passengers. *See Everett*, 912 F.2d at 1356 (slip and fall); *Keefe*, 867 F.2d at 1320 (same). In fact, the Eleventh Circuit has not yet had an opportunity to address the question of whether a ship owner can be held vicariously liable for its employee's intentional torts, but, if it were faced with this issue, the Eleventh Circuit would likely adopt the approach of the First, Fifth, and Ninth Circuits.

It is significant that three out of the four circuits that have decided the issue of a ship owner's liability for crew members' assaults upon passengers have adopted the approach relied on by the plaintiff. This majority view makes the most sense because it limits *Kermarec* to its facts, while implicitly recognizing that Supreme Court cases such as *Brockett* and *Jopes* have not been overruled. Additionally, in *Tullis v. Fidelity and Casualty Company of New York*, 397 F.2d 22 (5th Cir. 1968), the former Fifth Circuit, while reviewing a negligence claim against a ship owner, recognized that "the unconditional responsibility of the carrier for the misconduct of the crew toward passengers" is the only

exception to the rule that ship owners can be held liable for personal injury only if negligence on their part is established. *Id.* at 23. Because *Tullis* is binding on the Eleventh Circuit,[3] further support exists for the conclusion that the Eleventh Circuit would find ship owners vicariously liable for their employees' intentional misconduct. Accordingly, this court shall adopt the approach of the First, Fifth, and Ninth Circuits.

C. Scope of Employment

1. The Circuits Are Split

The conclusion that a ship owner can be held vicariously liable for an employee's assault upon a passenger is not dispositive of the defendants' motion to dismiss. As the defendants point out, there remains the question of whether a ship owner can be vicariously liable for its servant's tortious conduct when the act in question is committed outside the scope of its servant's employment. Throughout her complaint, the plaintiff attempts to hold the defendants liable under a theory of unconditional vicarious liability, for she fails to allege that Aydin committed the sexual assault within the scope of his employment. According to the defendants, because Aydin's conduct did not occur within the course and scope of his employment or in furtherance of the ship's business, they cannot be held liable, even under the theory of vicarious liability.

Authority exists to support the defendants' position. In *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307 (5th Cir.

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[3] The Eleventh Circuit adopted as binding precedent all cases decided by the former Fifth Circuit Court of Appeals prior to the close of business on September 30, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

1988), the Fifth Circuit applied a vicarious liability standard and imputed liability upon a ship owner for a captain's fraudulent execution of a contract. However, the Fifth Circuit repeatedly emphasized that, in order to bind the ship owner, the acts of the employee must be performed within the scope of the agency. *Id.* at 1309–10. It stated, "This agency relationship makes the owner responsible for both contracts made by the captain as well as the captain's torts, so long as the torts are committed within the scope of the captain's normal duties and employment." *Id.* at 1310. The Fifth Circuit went on to apply a number of factors[4] in determining whether the actions of the captain were imputable to the ship owners, and it found that the factors militated strongly in favor of imputing the captain's actions to the ship owners. *Id.*

Although no circuit other than the Fifth has directly decided whether a ship owner can be liable for tortious conduct committed by a servant who acts outside the scope of his or her employment, authority also exists to support the plaintiff's position. In *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891), the Supreme Court held that a railroad company could be liable for the shooting of a passenger by a

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[4] In deciding whether the captain had acted within the scope of his employment, the Fifth Circuit considered the following factors: (1) the time, place and purpose of the act; (2) its similarity to acts which the servant is authorized to perform; (3) whether the act is commonly performed by such servant; (4) the extent of departure from normal methods; (5) the previous relations between the parties; and (6) whether the master would reasonably expect that such an act would be performed. *Jackson Marine Corp.*, 845 F.2d at 1310.

conductor.[5] It also removed the requirement that a servant act within the scope of his or her employment in order to impose vicarious liability on a common carrier. The Court reviewed cases and commentaries discussing the duties of common carriers and stated, "[I]t may be said that the carrier is liable for every conceivable wrongful act done to a passenger by its train hands and other employees while they are engaged in transporting him, no matter how willful and malicious the act may be, or how plainly apparent from its nature that it could not have been done in furtherance of the carrier's business." *Id.*, 142 U.S. at 26. It added, "[O]wing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of the employment." *Id.*, 142 U.S. at 27, 12 S. Ct. at 112. *Jopes* has never been overruled or called into question by the Supreme Court or any other court aside from the Fifth Circuit. Accordingly, the doctrine still holds. Moreover, in *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993), the Ninth Circuit cited with approval several state court cases

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[5] Although the defendant in Jopes was a railroad company, Jopes is applicable to the facts of this case because some of the decisions relied on by the Supreme Court involved passenger cruise ships. More importantly, trains and cruise ships are considered common carriers of passengers, so common carrier standards are applicable to both modes of transportation. *See* 46 U.S.C. App. § 1702(6) (defining common carrier as "a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation"); *see also Shultz v. Florida Keys Dive Center, Inc.*, 224 F.3d 1269, 1273 (11th Cir. 2000) (describing cruise ships as common carriers).

that held common carriers "vicariously liable for assaults committed by employees even outside their employment during the contract for transportation". *Id.*, 984 F.2d at 292 (citing *St. Michelle v. Catania*, 252 Md. 647, 250 A.2d 874, 876–78 (App. 1969); *Whittle v. Southern Bell Tel. & Tel. Co.*, 306 S.C. 163, 410 S.E.2d 575, 575 (S.C. App. 1991); *Nazareth v. Herndon Ambulance Svc., Inc.*, 467 So.2d 1076, 1078–81 (Fla. 5th DCA 1985)).

2. Florida Law

From this survey of case law, it is apparent that federal admiralty law is split as to whether a ship owner can be held vicariously liable for torts committed outside the course of a servant's employment. When there is no uniform, binding federal law, application of state law is proper. *See Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co.*, 207 F.3d 1247, 1251 (11th Cir. 2000). As a result, applying Florida law to the instant facts would in no way alter the uniformity of admiralty decisions. The general rule is that the assault and rape of a plaintiff by the defendant's employee is considered to be outside the scope of employment and, therefore, insufficient to impose vicarious liability on the employer. *See Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494, 1507 (M.D. Fla. 1995); *Nazareth v. Herndon Ambulance Svc., Inc.*, 467 So.2d 1076, 1078 (Fla. 5th DCA 1985). However, like other states, Florida recognizes an exception for common carriers. *See Restatement (Second) of Agency* § 214. For example, in Nazareth, 467 So.2d 1076, a Florida court held that an ambulance service was vicariously liable for an ambulance attendant's sexual assault of a passenger because the assault occurred en route to the hospital. The court explained that an "established exception to the general rule [of nonliability] is where the employer is a common carrier for hire to the public, and the tort or attack is by an employee upon a passenger while the contract for transport is being accomplished." *Nazareth*, 467 So.2d at

1078. Other Florida courts are in accord. *See, e.g., Nadeau v. Costley*, 634 So.2d 649, 652 (Fla. 4th DCA 1994) (holding cruise line liable for employee's sexual assault of passenger, notwithstanding fact that it was outside scope of employment); *Commodore Cruise Line, Ltd. v. Kormendi*, 344 So.2d 896, 898 (Fla. 3d DCA 1977) ("[I]n comparison to an ordinary master-servant relationship, a common carrier is liable to a passenger for the wrongful acts of his or her employees during the contractual period, notwithstanding the fact that said acts are not within the scope of the employees employment.").

Under Florida law, then, it is clear that the plaintiff's failure to allege that Aydin's assault occurred within the scope of his employment is not fatal to her complaint. Rather than showing that the assault occurred within the scope of Aydin's employment, the plaintiff need only show that the assault occurred during the contractual period. *See Nadeau*, 634 So.2d at 652; *Kormendi*, 344 So.2d at 898. However, a review of the plaintiff's complaint reveals that she has failed to allege that the assault, which occurred while the M/V Zenith was docked at Hamilton, Bermuda, took place during the relevant contractual period. For this reason, counts III, IV, V, and VI are dismissed without prejudice so that the plaintiff can amend her complaint accordingly.

III. Medical Negligence

In counts II,[6] VII, and VIII the plaintiff seeks to hold the defendants liable for the cruise ship doctor's underlying neg-

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[6] Count II of the plaintiff's complaint contains general allegations of negligence, which include the defendants' alleged failure to investigate, to properly supervise its employees, and to properly render medical care. This subsection addresses count II

[Footnote continued on next page]

ligence in failing to treat her assault-related injuries properly. These claims fail as a matter of law. It is a long-established rule in admiralty that "a ship owner cannot be responsible for the negligence of its ship doctor." *Warren v. Ajax Navig. Corp. of Monrovia*, 1995 WL 688421 *3, No. 91–0230 (S.D. Fla. Feb. 3, 1995) (stating principle); *Mascolo v. Costa Crociere*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989) (holding that ship doctor's negligence could not be imputed to ship owner). A plaintiff may properly bring a claim against a ship owner for negligence if the owner did not exercise reasonable care in selecting a competent doctor. *See Warren*, at *4; *Mascolo*, 726 F. Supp. at 1286 n. 1. Because the plaintiff has failed to allege negligent hiring or retention as it relates to the ship's doctor, the defendants' motion to dismiss is granted on this issue. Counts VII and VIII are dismissed in their entirety, and the allegations contained in count II that relate to the doctor's underlying negligence are stricken.

IV. Duty to Investigate

Among the allegations contained in count II of the complaint is the plaintiff's contention that the defendants were negligent in failing to investigate the assault properly. See Compl. at ¶ 37(j). In their motion, the defendants argue that, as a matter of law, they cannot be held liable for failing to investigate the plaintiff's sexual assault. The plaintiff has failed to respond to this argument, and her failure to file an opposing memorandum "may be deemed sufficient cause for granting the motion by default." *See* S.D. Fla. L.R. 7.1(C). Even if this were not true, the court finds that the defendants' motion to dismiss on this point is meritorious. *See York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159, 164

[Footnote continued from previous page]
only as it relates to the plaintiff's allegations regarding the doctor's improper medical treatment of the plaintiff.

(S.D.N.Y. 1994) (holding that ship owner's alleged failure to investigate assault did not constitute negligence); *Jaffess v. Home Lines, Inc.*, 1988 WL 42049 *6, No. 85 CIV 7365 (S.D.N.Y. April 22, 1988) (stating that there is "no authority for extending a ship owner's duty to aiding a passenger in investigating an assault after it occurs"). Accordingly, the allegations of count II that relate to the defendants' alleged failure to investigate the assault are stricken.

V. Breach of Contract

Counts I and IX of the complaint are for breach of contract of carriage and breach of contract, respectively. According to the plaintiff, the defendants breached an implied contractual duty when they failed to transport her to and from the cruise destination with the highest degree of care and vigilance for her safety. The defendants argue that these claims fail to state a cause of action because such a contractual obligation cannot be implied under the law of admiralty. In support of their argument, they rely on *Hass v. Carnival Cruise Lines*, 1986 WL 10154, No. 86–33–CIV (S.D. Fla. Mar. 20, 1986), where this court held that maritime law will not imply a warranty of seaworthiness and will not support a breach of contract action unless there is an express provision in the contract of carriage guaranteeing safe passage. *Hass*, at *1.

In her complaint, the plaintiff relies on no express contractual provision guaranteeing safe passage. Instead, she argues that such a duty is implied under Florida law and that the federal rule on implied duties is not dispositive. While Florida cases may allow such claims, the rule within this district is clear that breach of contract actions cannot be implied. *See Hass*, at *1. As a result, the court cannot look to state law to decide the matter. *See Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co.*, 207 F.3d 1247, 1251 (11th Cir. 2000) (stating that application of state law is proper only in absence of uniform, binding federal law).

Moreover, the actual contract of carriage, which is attached as an exhibit to the complaint, flatly contradicts a duty to provide safe passage. Clause 3 of the contract states, "No undertaking or warranty shall be given or shall be implied as to the seaworthiness, fitness, or condition of the Vessel...." Clause 4 adds, "Any medical personnel ... are provided solely for the convenience of the Passenger.... Carrier assumes no liability whatsoever for any treatment, diagnosis, advice, examination or other services provided by such persons." Given this language and the case law cited above, the plaintiff may not proceed with her causes of action for breach of contract, and counts I and IX are dismissed.

VI. Negligence

Count II of the plaintiff's complaint contains several allegations of negligence. Two of these (the duty to investigate and underlying medical negligence) have been addressed elsewhere in this order. In support of their motions to dismiss count II, the defendants argue that the plaintiff has failed to otherwise state a cause of action for negligence because she has not pled sufficiently the elements of a claim for negligent hiring. The defendant ignores the fact that count II contains several other allegations of negligence. For example, the plaintiff has claimed that: (1) the defendants failed to enforce their non-fraternization policies, which, if enforced, might have averted the sexual assault and battery of the plaintiff; (2) the defendants failed to properly control, supervise, and restrict their crew; (3) the defendants failed to provide proper security measures; and (4) the defendants failed to warn female passengers of the potential dangers of being on board and ashore with crew members. *See* Compl. at ¶ 37.

Although the defendants arguments regarding the pleading of negligent hiring are insufficient grounds to dismiss count II, the defendants are correct that the plaintiff has failed to allege the proper standard of care under count II.

Nowhere in this count does the plaintiff allege that the defendants failed to exercise "reasonable care under the circumstances." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). Because count II does not contain an allegation regarding the proper standard of care for a negligence action, that count is dismissed without prejudice.

VII. Punitive Damages and Attorneys' Fees

In their request for relief, the plaintiffs seek both punitive damages and attorneys' fees, but, under admiralty law and the facts of this case, neither of these are recoverable. The Eleventh Circuit has held that punitive damages are not available for negligence claims in admiralty cases. In *In re Amtrak "Sunset Limited"*; 121 F.3d 1421 (11th Cir. 1997), the Eleventh Circuit stated, "Unless or until the United States Supreme Court should decide to add state remedies to the admiralty remedies for personal injury, personal injury claimants have no claim for nonpecuniary damages such as ..., punitive damages, except in exceptional circumstances...." *Id.* at 1429. The same rule applies in maritime tort actions where a plaintiff seeks to hold a defendant vicariously liable for the actions of its employees. *See Muratore v. M/S Scotia Prince, Etc.*, 845 F.2d 347, 354 (1st Cir. 1988) (holding that principal could not be held liable for punitive damages where it neither authorized nor ratified employee's acts). Accordingly, the plaintiff cannot recover punitive damages.

The defendants also correctly argue that the plaintiff cannot recover attorneys' fees in this case.[7] Under federal maritime law, absent specific federal statutory authorization

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[7] The plaintiff's opposition to the motion to dismiss does not address this point.

for an award of attorneys' fees, the prevailing party is not entitled to those fees. *See Garan, Inc. v. M/V Aivik*, 907 F. Supp. 397, 399 (S.D. Fla. 1995) (holding that federal maritime common law preempted state statute that permitted recovery of attorneys' fees). The plaintiffs have failed to show that a statute authorizes attorneys' fees in this case, and, as a result, their request for attorneys' fees is stricken. Accordingly, it is:

ORDERED AND ADJUDGED that:

1. The defendants' motions to dismiss (DE # 8, 27) are granted in part and denied in part.

2. Counts I, VII, VIII, and IX of the plaintiff's complaint are dismissed with prejudice.

3. Counts III, IV, V, and VI of the plaintiff's complaint are dismissed without prejudice.

4. The allegations contained in count II that relate to the doctor's negligence and the defendant's alleged duty to investigate are stricken, and the remainder of count II is dismissed without prejudice.

5. The plaintiff's request for punitive damages and attorney's fees are stricken.

6. The plaintiff has twenty (20) days from the date of this order to file an amended complaint.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 00-25234-CIV-MARTINEZ

JANE DOE,

Plaintiff,

v.

CELEBRITY CRUISES, INC., *et al.*,

Defendants.

Sept. 23, 2003

Gerhart Adam Schreiber, Mary Lou Rodon–Alvarez, Schreiber Rodon–Alvarez, Coral Gables, FL, George J. Tsimis, Stephan Skoufalos, Richard M. Ziccardi, Daniel F. Paige, Skoufalos Llorca & Ziccardi, Stamford, CT, for plaintiff.

Ralph O. Anderson, Hicks & Kneale, Hollywood, CA, Carol Flynn Finkelhoffe, Jeffrey Bradford Maltzman, Darren Wayne Friedman, Kay Rose & Maltzman, Miami, FL, for defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

MARTINEZ, District Judge.

THIS CAUSE came before the Court upon the various post-verdict motions filed, including: Defendants' Motion for Judgment as a Matter of Law (D.E. No. 225–1), Defendants' Motion for a New Trial (D.E. No. 226–1), and Defendants' Motion for Remittitur (D.E. No. 227–1), filed on *December 12, 2002*. The Court held argument on the fully-briefed motions and has ordered supplemental briefing, which has been completed. The Court has carefully considered the case file and is sufficiently advised. For the reasons set forth below, the Court shall grant Defendants' Motion for Judgment as a Matter of Law.

I. BACKGROUND

Plaintiff, Jane Doe, initiated her case on July 14, 2000 (D.E. No. 1–1). As the parties stipulated in their Joint Pretrial Stipulation ("JPTS") (D.E. No. 159–1):

> This case involves a female passenger [Jane Doe] aboard a cruise ship who alleges to have been sexually assaulted, raped and battered by a male crewmember [sic] [Baris Aydin] while ashore in Bermuda during a roundtrip [sic] cruise from New York to Bermuda. The plaintiff alleges that as a result of the rape she has suffered damages resulting from emotional, psychological, and physical injuries. The Defendants allege the encounter was consensual and deny that any sexual assault, rape or battery occurred.

JPTS at 1. Jane Doe originally sued the following Defendants: Celebrity Cruises, Inc. ("Celebrity") (the ship operator), Zenith Shipping Corporation ("Zenith") (the ship

owner), Apollo Ship Chandlers Corporation ("Apollo") (provides services to the catering company), Baris Aydin (the crew member), and M/V Zenith, in rem (the vessel) (see Complaint, D.E. No. 1–1). Doe filed a nine-count complaint, which alleged breach of contract of carriage; negligence; battery; intentional infliction of emotional distress; negligent infliction of emotional distress; and breach of contract.

Defendants, Celebrity, Apollo, and Zenith, filed motions to dismiss (D.E.Nos.8–1, 27–1). Defendant, Baris Aydin, was never served with a summons and a copy of the complaint (see generally the docket). The Honorable Alan S. Gold granted in part and denied in part Defendants' motions (D.E. No. 29–1). Judge Gold dismissed with prejudice Doe's allegations regarding: breach of contract; duty to investigate; and the ship doctor's negligence. *Id.* With regard to the remaining allegations, Judge Gold, as is discussed more fully below, held vicarious liability can be imposed upon a common carrier for Aydin's tortious conduct, which occurred outside the scope of his employment. *Id.* Judge Gold noted Doe's Complaint failed to allege the claimed intentional torts occurred during Aydin's contractual period; therefore, Judge Gold dismissed those counts without prejudice. *Id.*

Doe filed her Amended Complaint (D.E. No. 33–1), which was followed by a motion to dismiss by Defendants, Celebrity, Apollo, and Zenith (D.E. No. 36–1). Prior to the Court ruling on the motion to dismiss, Doe filed her Second Amended Complaint (D.E. No. 84–1), which added Celebrity Catering Services Partnership ("CCSP") (the catering company) as a Defendant. Judge Gold subsequently granted in part and denied in part Defendants' motion to dismiss by striking two of Doe's negligence allegations and leaving the remaining allegations pending (D.E. No. 85–1).

Doe filed her Third Amended Complaint on August 2, 2001 (D.E. No. 87–1), which was the operative complaint at the time of trial. This cause was subsequently reassigned to

the undersigned on September 24, 2002 (D.E. No. 151–1). On October 18, 2002, the parties submitted their Joint Pretrial Statement (D.E. No. 159–1), which stated: "For the purposes of the forthcoming trial, the parties will try only those issues relating to the strict (vicarious) liability articulated and ordered by Judge Gold in his Order dated February 26, 2001." Therefore, the claims at issue for the trial were Doe's claims of strict liability against the Defendants for the alleged intentional torts by Aydin for intentional infliction of emotional distress, sexual assault, and sexual battery.

A jury trial was held in this matter on November 18, 2002 through November 22, 2002. The Court granted Defendants' motion for judgment as a matter of law on Doe's intentional infliction of emotional distress claim and denied the motion for a judgment as a matter of law on the claims of sexual assault and sexual battery. The claims of sexual assault and battery were submitted to the jury (*see generally*, Jury Instructions, D.E. No. 218–1). The jury found Aydin did not sexually assault Doe; however, the jury found Aydin did commit a sexual battery upon Doe and awarded Doe $1,000,000.00, attributing 25% responsibility to each of the Defendants, Celebrity, Zenith, Apollo, and CCSP (D.E. No. 219–1).

The Defendants sought re-submission to the jury, arguing the verdict was inconsistent, which this Court denied (D.E. No. 221–1) after hearing argument and reviewing the legal memoranda submitted by the parties (D.E. Nos.210–1, 220–1). The Court entered judgment on November 27, 2002 (D.E. No. 222–1).

Defendants filed their post-verdict motions on December 12, 2002 (D.E. Nos. 225–1, 226–1, 227–1). The Court heard argument on the post-verdict motions on March 18, 2003. During the hearing and by subsequent Order, the Court ordered supplemental briefing (D.E. 253–1). The parties

filed their additional legal memoranda, which may be found at D.E. Nos. 256–1 and 257–1.

II. STANDARD OF REVIEW

Under a renewed motion for judgment as a matter of law, under Fed. R. Civ. P. 50(b), the Court must review the motion under the standard of Fed. R. Civ.P. 50(a). Under Fed. R. Civ. P. 50(a):

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

The Court must view the evidence in the light most favorable to the party opposing the motion. *See e.g.*, *Reynolds v. CLP Corp.*, 812 F.2d 671, 674 (11th Cir. 1987). The Court does not weigh the conflicting evidence or make credibility decisions. *Id.* "The trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (citations omitted). In this case, Doe has not established she is entitled to judgment under the governing law.

III. ANALYSIS

Defendants' seek judgment as a matter of law under various theories. Defendants' claim Judge Gold's opinion that held Defendants could be held vicariously liable for the intentional torts of an employee outside the scope of his employment is incorrect, and Defendants are entitled to

judgment as a matter of law based upon Plaintiff's inconsistent prior sworn testimony (see motion, D.E. No. 225–1).

With regard to Judge Gold's opinion, the Court is bound by the law-of-the case doctrine. The Supreme Court described the law-of-the-case doctrine as follows:

> A court has the power to revisit prior decisions of its own court or of a coordinate court in any circumstance, although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988). The Eleventh Circuit has clarified: "Courts must rarely invoke the 'clear error' exception, less the exception swallow the rule." *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1370 (11th Cir. 2003). In this case, the Court does not find Judge Gold's opinion to be clear error; therefore, this opinion shall not disturb Judge Gold's holding.

With regard to Defendants' second argument about Plaintiff's inconsistent testimony, this Court shall not make a credibility determination, because, under the above-discussed legal standard, the Court is required to determine if there is a sufficient evidentiary basis for the jury's determination. Fed. R. Civ. P. 50(a). In this case, the jury reasonably could have concluded Jane Doe was more credible than Aydin, and the verdict reflects such finding.

In reviewing Defendants' motions, the Court, however, became concerned with the evidence as it related to Judge Gold's opinion. Judge Gold, in his opinion issued on

February 26, 2001, posed the issue: "can vicarious liability be imposed for Aydin's tortious conduct?" (D.E. No. 29–1 at 5).[1] This issue sets forth two distinct questions: 1) is the proper standard strict liability or negligence; and 2) can the employer be held strictly liable for the acts done outside the employee's scope of employment. After an analysis of the relevant case law, Judge Gold found the circuits are split on whether the relevant standard to impose liability is strict liability or negligence. The Court of Appeals for the Eleventh Circuit has not yet had the opportunity to address the issue; therefore, Judge Gold found "if it were faced with this issue, the Eleventh Circuit would likely adopt the approach of the First, Fifth, and Ninth Circuits," which have determined the relevant standard is strict liability. *Id.* at 5–9.

With regard to the issue of whether an employer may be held strictly liable for the acts outside the scope of his employment, Judge Gold again found the circuits are split. *Id.* at 9–12. Thus, Judge Gold applied Florida law. *Id.* at 12–13 (citing *Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co.*, 207 F.3d 1247, 1251 (11th Cir. 2000)) (where there is no uniform, binding federal law, application of state law is proper). Accordingly, Judge Gold held:

> The general rule is that the assault and rape of a plaintiff by the defendant's employee is considered to be outside the scope of employment, and therefore, is insufficient to impose vicarious liability on the employer. However, like other states, Florida recognizes

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[1] Judge Gold's opinion is published at *Doe v. Celebrity Cruises, et al.*, 145 F. Supp. 2d 1337 (S.D. Fla. 2001); however, the Court shall cite to the page numbers of the opinion located at D.E. No. 29-1 for consistency.

> an exception for common carriers.... The court [in *Nazareth v. Herndon Ambulance Svc., Inc.*, 467 So.2d 1076, 1078 (Fla. App. 5th Dist.1985)] explained that an "established exception to the general rule" [of nonliability] is where the employer is a common carrier for hire to the public, and the tort or attack is by an employee upon a passenger while the contract for transport is being accomplished.

Id. at 12 (citations omitted). In summary, Judge Gold held a common carrier[2] may be held strictly liable for its' employee's intentional torts that are committed outside the scope of employment.

Title 46, section 1702(6) of the United States Code defines a common carrier as "a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation." Courts recognized the duty imposed upon the carrier in such a relationship: "[i]t is elemental that a contract of a common carrier to transport a passenger to a given destination imposes on the carrier an obligation to transport the passenger to this destination in a reasonably safe manner." *See Heredia v. Safeway Trails,*

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[2] Judge Gold's opinion regarding the proper standard of care (negligence or strict liability) refers to the "ship operator" (page 5); "ship owner" (pages 5, 6, 7, 8, 9, and 10); and "common carrier" or "maritime carrier" (pages 6, 7, 8, and 11). In cases like this one, where the ship operator and ship owner are not the same entity, the issue of liability could turn on the precise definition of common car rier and whether such definition included both the operator and owner. In the case at hand, however, the distinction is irrelevant, as is discussed below.

Inc., 369 So.2d 418, 420 (Fla. App. 3d Dist. 1979), *cert. den.*, 378 So.2d 348 (Fla.1979). Common carriers by sea include: "ferries, ocean liners, or cruise ships." *Shultz v. Florida Keys Dive Center, Inc.*, 224 F.3d 1269, 1273 (2000).

In reviewing the post-verdict motions, the Court became concerned sua sponte with whether Plaintiff had shown the Defendants were common carriers who employed Aydin, thereby properly imposing liability for Aydin's tortious act of sexual battery, as found by the jury. Although neither party *at any time* raised this issue, the Court under Fed. R. Civ. P. 50(b) shall consider it. Under Fed. R. Civ.P. 50(a), as is quoted above, the Court may "grant a motion for judgment as a matter of law against that party with respect to a claim or defense *that cannot under the controlling law be maintained*" (emphasis added). Plaintiff must show a Defendant is both: 1) a common carrier, and 2) Aydin's employer in order for the Court to impose liability for Aydin's act of sexual battery, as found by the jury. Therefore, the Court ordered the parties to file supplemental memoranda of law on the issue.[3] The Court shall discuss the status of each Defendant in turn.

A. Celebrity Cruises

The parties, in their Joint Pretrial Stipulation, agreed as to the status of Celebrity. The parties stipulated: "At all relevant times, Celebrity Cruises, Inc. ('Celebrity') was and

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[3] Plaintiff's supplemental memorandum of law failed to assist the Court in reaching its determination (D.E. No. 256–1). Doe argues the Court is bound by Judge Gold's ruling and the parties' agreement in the JPTS to try the case according to Judge Gold's opinion. The Court agrees. However, it is the *application* of such ruling the Court must decide, and Doe failed to address the issue with which the Court is concerned.

is a foreign corporation which [sic] maintains its principal place of business in Miami, Florida. *Celebrity is the operator of the cruise vessel* " (JPTS at ¶ III(B)) (emphasis added). Also, Doe's ticket, which was offered as Plaintiff's Exhibit No. 1 at trial (D.E. No. 231–1, p. 3, L.10–21) and is attached to her Third Amended Complaint (D.E. No. 89–1), bears the name of Celebrity. The evidence is sufficient to show Celebrity is a common carrier.

However, Celebrity is not Aydin's employer. The parties further stipulated: "CCSP [Celebrity Catering] employed Baris Aydin ('Aydin') at the time of the alleged incident" (JPTS at ¶ III(E)). In further support of the proposition that Celebrity is not Aydin's employer, Aydin of fered the following testimony at trial:

> Question [by Defendants' counsel]: Do you recall the name of the company that screened you and recommended you for the job on the Celebrity ship?
>
> Answer [by Aydin]: You mean where I was working as a reference?
>
> Q: No. Do you know the name of [Apollo]?[4]
>
> A: Yes.
>
> Q: Was that your actual employer on the ship?
>
> A: Yes.
>
> Q: Were you actually employed by Celebrity Cruise Lines or you just worked on their vessel?

---

[4] Although the transcript reads "Paula" the reference is properly to Defendant "Apollo."

A: I worked on their vessel.

(Aydin Direct Examination, D.E. No. 224–1, pp. 24, L. 19 through p. 25, L.3). On cross examination, Plaintiff's counsel solicited the following exchange:

> Q [by Plaintiff's counsel]: You worked on the Zenith Cruise Ship from approximately 1997 to 1999; is that correct?
>
> A [by Aydin]: Yes, sir.
>
> Q: Who operates that cruise ship?
>
> A: Celebrity Cruise Line.

(Aydin Cross Examination, D.E. No. 224– 1, p. 95, L. 15 through L. 19). This is the extent of the evidence before the Court regarding which entity is Aydin's employer. Therefore, although Celebrity may be a common carrier, it is not Aydin's employer, as evidenced by the parties' stipulation and the trial testimony. Therefore, there is no basis, from the evidence before the Court, under which this Court may hold Celebrity strictly liable for Aydin's tortious conduct.

B. Zenith Shipping Corporation

The parties stipulated Zenith "is a foreign corporation, organized and existing under the laws of Liberia, *which owns the vessel M/V Zenith*" (JPTS at ¶ III(C)) (emphasis added). The record does not reflect any further evidence regarding Zenith for the Court to determine whether Zenith is a common carrier.

However, as discussed above, Zenith is not Aydin's employer. Accordingly, under the evidence before the Court, Zenith cannot be held strictly liable for Aydin's tortious conduct.

C. Apollo Ship Chandlers, Inc.

Apollo, as was stipulated by the parties, "is a domestic corporation which [sic] maintains its principal place of business in Miami, Florida, and *provides services to Celebrity Catering Services Partnership*" (JPTS at ¶ III(D)) (emphasis added). There is no further evidence contained in the trial record from which this Court can conclude Apollo is a common carrier. Apollo, therefore, cannot be held vicariously liable for Aydin's tortious conduct.

D. Celebrity Catering Services Partnership

Celebrity Catering is the final Defendant this Court must discuss. The parties stipulated: "Celebrity Catering Services Partnership ('CCSP') was and is a foreign corporation which [sic] maintains an office in Monrovia, Liberia and *hires individuals for employment in the food and beverage departments of Celebrity cruise vessels*, including M/V Zenith. *CCSP employed Baris Aydin ('Aydin') at the time of the alleged incident.*" (JPTS at ¶ III(E)) (emphasis added). Again, there is no evidence from which this Court could conclude CCSP is a common carrier. Accordingly, CCSP cannot be held strictly liable for Aydin's intentional tort.

IV. CONCLUSION

In summary, there is no Defendant in this case who is both a common carrier and Aydin's employer for this Court to impose strict liability for the tort the jury found was committed by Aydin against Doe. Under Fed. R. Civ. P. 50(b), the Court shall grant Defendants' motion for judgment as a matter of law, since Doe cannot maintain her claims for vicarious liability under the controlling law, as stated in Judge Gold's opinion.

Additionally, under Fed. R. Civ. P. 50(c), since the Court granted Defendants' motion for judgment as a matter of law, the Court is also required to discuss Defendants' motion for a new trial (D.E. No. 226–1). Since the Court has found there

is no basis from the evidence before this Court upon which any Defendant may be held liable for Ayin's conduct, there is no basis for Defendants' to seek a new trial. As such, Defendants' motion for a new trial is moot.

On the other hand, the issue the Court confronts is whether Doe should be granted a new trial based upon this opinion. Under Fed. R. Civ. P. 59(a): "[a] new trial may be granted ... for any of the reasons for which new trials have heretofore been granted." The reasons courts have granted new trials are:

> [T]he verdict is against the weight of the evidence, that the damages are excessive, or that for any other reasons the trial was not fair, and that the motion [for new trial] may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.

11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2805 (2d ed. 1995) (citations omitted).

In this case, the parties were aware of the theory under which they proceeded, as is evidenced by the JPTS (D.E. No. 159–1). However, Doe did not present evidence upon which this Court could have imposed liability, in accordance with Judge Gold's opinion. Courts have denied motions for new trials where counsel failed to introduce evidence that existed at the time of trial. *See Aerated Prods. Co. Of Los Angeles v. Aeration Processes*, 95 F. Supp. 23 (S.D. Cal. 1950). Further: "Appellant cannot relieve himself from the operation of the rule requiring presentation of the question to the trial court by raising it for the first time in his Motion for New Trial." *Wheeler v. Woods*, 723 P.2d 1224, 1228 (Wyo. 1986). Accordingly, the Court shall not grant Doe a new trial for the abovestated reasons. It is, therefore:

ORDERED AND ADJUDGED that

1. Defendants' Motion for Judgment as a Matter of Law (D.E. No. 225–1) is hereby GRANTED.

2. The judgment in this case (D.E. No. 222–1) is hereby VACATED.

3. Judgment SHALL BE ENTERED in favor of Defendants, as is stated above. Plaintiff SHALL TAKE NOTHING by this action and Defendants SHALL GO HENCE without day.

4. The Clerk of the Court is DIRECTED to mark this case CLOSED and DENY ALL PENDING MOTIONS AS MOOT.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15321-II

JANE DOE,

Plaintiff-Appellant-Cross Appellee,

versus

CELEBRITY CRUISES, INC., in personam
ZENITH SHIPPING CORPORATION, in personam,
APOLLO SHIP CHANDLERS, INC., in personam
CELEBRITY CATERING,

Defendants-Appellees-Cross-Appellants

BARIS AYDIN, in personam
M/V ZENITH, her engines,
boilers, tackle, etc., in rem

Defendants-Appellees.

On appeal from the United States District Court for the
Southern District of Florida

Before: HULL and MARCUS, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES DISTRICT JUDGE

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

No. 05-121

IN THE

Supreme Court of the United States

CELEBRITY CRUISES, INC., *et al.*,

Petitioners,

v.

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Well over a century ago, this Court in *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887) and *New Orleans & N.E.R.R. Co. v. Jopes*, 142 U.S. 18 (1891) articulated a fundamental principle of admiralty law in holding that a common carrier is strictly liable for the willful misconduct of its servants against passengers. Federal Circuits that have since considered the issue have scrupulously adhered to this strict liability standard.

No Federal Circuit Court has applied *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) to a case involving injuries suffered by a passenger as a result of intentional torts of a common carrier's servants. The Ninth and Eleventh Circuits have expressly rejected the application of the *Kermarec* negligence standard to such cases. *Kermarec* had nothing to do with a passenger; *Kermarec* did not involve an assault upon a passenger by a servant of the common carrier; *Kermarec* was a garden variety slip and fall case where plaintiff sustained injuries allegedly due to the condition of the ship; *Kermarec* did not discuss either *Brockett* or *Jopes*. In the instant case, the Eleventh Circuit concluded, "[q]uite simply, there is no indication in *Kermarec* that the Supreme Court intended to eliminate the more stringent rule in *Jopes* imposing liability on a common carrier for its employees' assaults of passengers."

The question presented is whether, given the Eleventh Circuit's proper application of a standard articulated by this Court in *Brockett* and *Jopes* and followed for the last one hundred fifteen years by Federal Circuit Courts, there is any basis warranting this Court's review.

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STATEMENT OF THE CASE

By way of supplementation to Petitioners' Statement of the Case, Respondent would add:

1. A unanimous nine member jury found that Baris Aydin, Petitioners' crew member, committed a sexual battery upon Respondent. The District Court ruled there was sufficient evidence on the record to support the jury's finding. (App. at 79a).

2. There is no split among the Circuits concerning the standard of care to be imposed upon a common carrier for its servants' intentional torts committed against passengers. The Eleventh Circuit, after "navigat[ing] through considerable precedent about the duty of common carriers to protect and safely transport their passengers and common carriers' corresponding liability for crew member assaults," rejected Petitioners' argument that there was a split in the Circuits on this issue. (App. at 24a-25a; 35a-36a; 40a-41a).

3. The Eleventh Circuit, while fully considering *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887), *New Orleans & N.E.R.R. Co. v. Jopes*, 142 U.S. 18 (1891) and *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), found no tension between the *Brocket-Jopes* rule of law and that of *Kermarec*, and rightly concluded that they represent separate lines of authority. (App. 33a-34a; 44a-45a). Accordingly, the Eleventh Circuit held that, following this Court's precedents in *Brockett* and *Jopes*, admiralty law, for well over one hundred years, has consistently imposed strict liability upon common carriers for crew member assaults on passengers. (App. at 35a-45a).

4. Following the Eleventh Circuit's reinstatement of the jury verdict, Petitioners sought rehearing *en banc*.

The petition for rehearing *en banc* was denied and no Judge of the Court requested that the Court be polled on rehearing *en banc*. (App. at 88a-89a).

5. Respondent respectfully directs this Court's attention to the Eleventh Circuit's thorough discussion of the procedural history and trial evidence in this case. (App. at 3a-25a).

REASONS FOR DENYING THE PETITION

This Court's decisions in *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887) and *New Orleans & N.E.R.R. Co. v. Jopes*, 142 U.S. 18 (1891), which enunciated a strict liability standard for intentional torts committed by a common carrier's servants, have withstood the test of time. Federal Circuits from 1906 to 2004 have invariably applied this standard, that is sound as a matter of policy. In the process, *Brockett* and *Jopes* have achieved the uniformity in admiralty law which this Court has always encouraged.

Simply stated, the petition is entirely based on a false premise, namely, that this Court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) abandoned the *Brockett-Jopes* strict liability standard. In two separate cases involving crew member sexual assaults on passengers, the Ninth Circuit in *Morton v. de Oliveira*, 984 F.2d 289 (9th Cir.), *cert. denied sub. nom., Carnival Cruise Lines, Inc. v. Morton*, 510 U.S. 907 (1993), and the Eleventh Circuit in *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004) have rejected outright this very same argument; in so doing, they were adhering to this Court's precedents in *Brockett* and *Jopes*.

Kermarec did not involve a passenger, but rather a visitor who suffered personal injuries while descending a ship's stairway. It did not involve an intentional tort perpetrated by a common carrier's crew member against a passenger. Indeed, as the Eleventh Circuit remarked, "*Kermarec* was a common, garden variety negligence case no matter how it is characterized." (App. at 34a). Importantly, *Kermarec* did not even mention *Brockett* or *Jopes*. It is therefore inconceivable that this Court in *Kermarec* would *unwittingly* discard well over a century of admiralty law precedent without explicitly stating so, and in the process *unintentionally* usher in a "modern trend" in admiralty law. *Kermarec* merely adopted a minimum standard of care for maritime personal injuries regardless of whether passengers or common carriers were involved – it never addressed, much less eliminated, the *Brockett-Jopes* strict liability standard applicable to common carriers in passenger-intentional tort cases.

Viewed in their proper light, *Brocket-Jopes* and their progeny and *Kermarec* and its progeny constitute two separate standards in admiralty law. The former, a strict liability standard in vigor since the late nineteenth century, applies only to a very specific situation: the commission of an intentional tort by a common carrier's servant against a passenger during a voyage. The latter, a negligence standard in use since 1959, applies to garden variety maritime personal injury cases, which occur far more frequently.

Petitioners provide no reasonable basis warranting this Court's review. Accordingly, the petition should be denied.

I. The Eleventh Circuit Followed The Rulings Of This Court In *Brockett* And *Jopes* And Is In Harmony With All Other Federal Circuits In Holding That Petitioners, As Common Carriers, Were Strictly Liable To Respondent, A Passenger, For The Assault Perpetrated By Petitioners' Crew Member During The Cruise Voyage

In 1887 and 1891, this Court established a fundamental principle of admiralty law in holding that a common carrier is strictly liable for crew member assaults on passengers. *Brockett*, 121 U.S. 637; *Jopes*, 142 U.S. 18. In the aftermath of *Brockett* and *Jopes*, across a span of at least one hundred fifteen years, Federal Circuits have invariably applied the strict liability standard to a common carrier for its servants' misconduct against paying passengers; in so doing, these courts scrupulously adhered to the rule of law enunciated in *Brockett* and *Jopes*. *THE MINNETONKA*, 146 F. 509 (2d Cir.), *cert. denied sub. nom., Atlantic Transport Co. v. Barnes*, 203 U.S. 589 (1906); *Kansas City Southern Ry. Co. v. Willsie*, 224 F. 908 (8th Cir. 1915); *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925), *cert. denied*, 269 U.S. 586 (1926); *Pullman Co. v. Hall*, 46 F.2d 399 (4th Cir. 1931); *Matthews v. Southern Ry. Syst.*, 157 F.2d 609 (D.C. Cir. 1946); *Tullis v. Fidelity and Casualty Co. of New York*, 397 F.2d 22 (5th Cir. 1968); *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988); *Morton*, 984 F.2d 289; *Gilstrap v. Amtrak*, 998 F.2d 559 (8th Cir. 1993); *Doe*, 394 F.3d 891.[1] Thus, the Eleventh Circuit's decision in this case is but the latest reaffirmation, in an uninterrupted continuum of jurisprudence, of a universal standard for such cases. There is no basis for this Court to review this long-settled standard.

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1. *See* App. at 30a n.16.

A. *Brockett* And *Jopes* Impose Strict Liability Upon A Common Carrier For Intentional Torts Committed By Its Servants Against Passengers

In *Brockett*, a case involving a passenger assault by the ship's watchman, this Court addressed for the first time the issue concerning the proper standard of care to be imposed upon a common carrier for its servants' misconduct against passengers. In holding the shipowner strictly liable for the crew member's assault of the passenger, this Court stated:

> [A] common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and *undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract* [for safe transportation].

121 U.S. at 645-46 (emphasis supplied).[2]

Four years later, in *Jopes*, the Court reaffirmed its prior *Brockett* holding that a carrier is absolutely bound to ensure

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2. In holding that a carrier has a duty "absolutely to protect its passengers" from the misconduct of its servants and describing that rule to be "peculiar" between common carriers and their passengers, this Court did not intend to limit that rule to acts performed within the servant's scope of employment. Otherwise, there would be nothing peculiar about a common carrier's absolute responsibility if it were confined by the scope of employment concepts. *See, e.g., Sutton*, 7 F.2d at 580 (relying upon *Brockett* for proposition that "scope of employment" is not required for imposition of strict liability upon common carrier); *THE MINNETONKA*, 146 F. at 513 (after quoting *Brockett* stating that "archaic doctrine that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside of the scope of his authority" had been renounced).

that its own servants do not unlawfully assault or injure a passenger:

> While a carrier does not insure his passengers against every conceivable danger, *he is held absolutely to agree that his own servants engaged in transporting the passenger shall commit no wrongful act against him. . . . Recent cases state this liability in the broadest and strongest language* . . . it may be said that the carrier is liable for every conceivable wrongful act done to a passenger by its train hands and other employes *while they are engaged in transporting him, no matter how willful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have been done in furtherance of the carrier's business.*

142 U.S. at 26 (citations omitted) (emphasis supplied). In this Court's view, the application of this stringent standard of care was necessary because of the special relationship that exists between a common carrier and its passenger:

> *[O]wing to the peculiar circumstances which surround the carrying of passengers*, as stated, *a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of the employment.* Noticeable instances of this kind are the cases of Craker v. Chicago & Northwestern Railway, 36 Wisconsin 657, in which, when a conductor had forcibly kissed a lady passenger, the company was held responsible for the unlawful assault; and Goddard v. Grand Trunk Railway, 57 Maine 202, in which, when a brakeman had committed a gross and

> offensive assault upon an invalid passenger, the company was held liable in damages.

142 U.S. at 27 (emphasis supplied).

Thus in *Brockett* and *Jopes*, this Court articulated the rule of law that imposes strict liability upon a common carrier, such as Petitioners, for assaults or other intentional torts perpetrated by their servants against passengers. The *Brockett-Jopes* rule has never been overruled or modified; certainly not by *Kermarec*. As the Eleventh Circuit correctly stated "*Brockett* and *Jopes* represent the current state of the controlling federal law as to crew member assaults on passengers." (App. at 35a-36a; 44a).

Respondent has never suggested that under *Brockett* and *Jopes* a common carrier is "an absolute insurer" of the safety of its passengers. Nor has any Circuit Court that has considered the subject issue ever asserted such. Petitioners' argument to the contrary raises a false issue. Indeed, *Brockett* and *Jopes* reject the notion that a common carrier is an "insurer" of the safety of its passengers. *See, e.g., Jopes*, 142 U.S. at 26 ("While a carrier *does not insure his passenger against every conceivable danger*, he is held absolutely to agree that his own servant engaged in transporting the passenger shall commit no wrongful act against him") (emphasis supplied). Rather, under *Brockett* and *Jopes*, the imposition of strict liability upon a common carrier for crew member misconduct on passengers rests upon the "peculiar" circumstances that surround the transportation of passengers. As a result of this special relationship between a common carrier and its passenger, the carrier is "held absolutely to agree that his *own servants* engaged in transporting the passenger *shall commit no wrongful act* against him." *Id.* (Emphasis supplied). Accordingly, the strict liability standard enunciated in *Brockett* and *Jopes*, while embracing a broad

and sound policy, nevertheless has an extremely narrow application; it applies in only those situations where a *passenger* is injured by the *willful misconduct* of *a common carrier's servants* during *the course of the voyage*.[3]

Brockett and *Jopes* have withstood the test of time, remaining undisturbed for well over a century and providing uniformity to admiralty law to this very date. In 1926 and again in 1993, in two cases involving the imposition of strict liability upon ocean carriers because of crew member sexual assaults on passengers brought before the Ninth Circuit, this Court denied *certiorari*. *Sutton*, 269 U.S. 586 (1926); *Morton*, 510 U.S. 907 (1993). The instant petition should be met with the same response this Court provided to the maritime carriers in *Sutton* and *Morton*: it should be denied.

B. The Eleventh Circuit's Decision Is In Harmony With The Decisions Of Other Federal Circuits That Have Squarely Addressed The Issue Concerning The Proper Standard Of Care To Be Imposed Upon A Common Carrier For Its Servants' Intentional Torts Against Passengers

All Circuit decisions which have directly confronted the instant issue have followed *Brockett* and *Jopes* and applied a strict liability standard against the common carrier for the misconduct of its servants against passengers. *THE MINNETONKA*, 146 F. 509; *Willsie*, 224 F. 908; *Sutton*, 7 F.2d 579; *Pullman*, 46 F.2d 399; *Matthews*, 157 F.2d 609; *Tullis*, 397 F.2d 22; *Muratore*, 845 F.2d 347; *Morton*, 984 F.2d 289; *Gilstrap*, 998 F.2d 559; *Doe*, 394 F.3d 891. The Eleventh Circuit, after "navigat[ing] through considerable precedent about the duty of common carriers to protect and

3. As will be discussed, *infra*, Petitioners' suggestion that the *Jopes*' strict liability language is *dictum* ignores over a century of precedent in the Circuit Courts following that decision.

safely transport their passengers and common carriers' corresponding liability for crew member assaults," rejected Petitioners' argument that there was a split in the Circuits on this issue. (App. at 24a-25a; 35a-36a; 40a-41a). Moreover, Federal Circuit Court jurisprudence for some one hundred fifteen years debunks Petitioners' baseless argument that the Eleventh Circuit decision in this case and the Ninth Circuit's 1993 decision in *Morton* are isolated events, establishing a "category" of their own. The simple truth is that those decisions are the most recent reaffirmations of a uniform principle of maritime law enunciated by this Court in *Brockett* and *Jopes* and recognized for over a century in courts throughout the nation.

1. First Circuit

In *Muratore*, the First Circuit followed the *Brockett-Jopes* rule concerning the issue of crew member intentional torts affecting passengers and the common carrier's liability for such misconduct. (*See also* App. 40a-41a). The First Circuit, confronting the issue of whether the harassment by crew photographers of a passenger subjected the cruise line defendant to liability, ruled that "a maritime carrier has an unconditional responsibility for the misconduct of its people toward passengers." 845 F.2d at 353. The *Muratore* Court, relied upon, *inter alia*, the opinion of the renowned admiralty scholars Gilmore and Black. *Id.* These scholars, in turn, cited this Court's holding in *Brockett* for the proposition that admiralty law recognizes the application of different standards of care concerning injuries suffered by passengers in slip and fall cases and those suffered as a result of the willful misconduct of a ship's servants:

> The subject of liability to passengers for [personal] injury may be summarily handled here, as the principles involved differ little from those

> in use ashore. The liability basis is negligence; there is no "insurer" relation and no "warranty" . . . (*The only apparent exception is the unconditional responsibility of the carrier for misconduct of his people toward the passengers. See New Jersey Steamboat Co. v. Brockett*, 127 U.S. 637 (1887)). (Emphasis supplied).

G. Gilmore and C.L. Black, *The Law of Admiralty*, § 1-10 at 23 n.77 (2d ed. The Foundation Press 1975). (*See also* App. at 41a-42a n.27). The Eleventh Circuit, therefore, correctly concluded that the First Circuit follows the absolute liability rule articulated by *Brockett and Jopes*.[4] (App. 41a-42a).

2. Second Circuit

The Second Circuit also follows the *Brockett-Jopes* continuum of precedent. *THE MINNETONKA*, 146 F. 509. (*See also* App. at 42a-43a). Conspicuously absent from Petitioners' discussion is *THE MINNETONKA* decision which is the controlling Second Circuit precedent on the subject issue. Therein, the Second Circuit, in a decision issued fifteen years after *Brockett* and *Jopes*, acknowledged that the proper standard of care applicable to common carriers, as articulated by this Court, for the intentional misconduct of their servants affecting passengers was that of strict liability, regardless of whether that misconduct occurred within the scope of employment. 146 F. at 513.

In *THE MINNETONKA*, the shipowner had been found liable for the theft of a passenger's jewelry by one of the ship's crewmembers. In affirming the lower court's ruling, and citing

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4. Just last year, the United States District Court for the District of Maine, on the basis of *Jopes*, *Morton* and *Muratore*, held that a cruise line is "[unconditionally] liable for the intentional torts of its crew members." *Peterson v. Scotia Prince Cruises, Ltd.*, 328 F. Supp. 2d 119, 122 (D. Me. 2004).

Brockett, the Second Circuit held that, "[t]he liability of the vessel for the willful torts of its own servants committed upon a passenger during the voyage is well established." 146 F. at 513. The Second Circuit went on to add:

> The *archaic doctrine* that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside of the scope of his authority and thus releases his employer from liability was long ago renounced by the great preponderance of authority . . . By the defendant's contract with the plaintiff, it had undertaken to carry him safely and to treat him respectfully; *and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or willful misconduct of its servants* while engaged in performing a duty which the carrier owes to the passenger.

146 F. at 513 (emphasis supplied).[5]

THE MINNETONKA decision has not been overruled, either expressly or *sub silentio*, by the Second Circuit. Petitioners' argument that *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2d Cir.), *cert. denied*, 232 U.S. 727 (1914), abandoned the rule that a common carrier is absolutely liable for crew member assaults on passengers is belied by a careful analysis of that decision.[6]

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5. Petitioners' position comes down to the proposition that what was an "archaic doctrine" in the nineteenth century is now the modern trend in admiralty jurisprudence.

6. Such analysis is critical, for Petitioners rely heavily on *Rivers* for the false proposition that a split of authority exists among the Circuits. While the District Court in this case shared the flawed perception of a "split" among the Circuits, Petitioners' same argument was properly rejected by the Eleventh Circuit. (App. at 40a-43a).

In *Rivers*, a passenger was attacked at night by the ship's watchman. After a jury verdict in favor of the passenger, the cruise ship defendant appealed. One of the issues on appeal was whether the district court had given appropriate jury instructions. The Second Circuit ruled that the district court had interpreted the issue "most favorably" to the shipowner by applying a negligence standard. In fact, the Second Circuit acknowledged, citing *Jopes* and *THE MINNETONKA*, that the jury instructions concerning the standard of care applicable to passenger assault claims had been less stringent than the applicable precedent indicated. The Second Circuit affirmed the judgment in *Rivers* simply because, although the district court had improperly permitted the application of a less stringent standard of care, the evidence at trial demonstrated that the shipowner was still liable to the passenger *even under the lower negligence standard*. This reasoning clearly follows from the fact that the *Rivers* Court cited *Jopes* with approval.

Further, *Rivers*' reliance upon *THE MINNETONKA*, decided in 1906, which, as discussed, applied a strict liability standard upon a shipowner for a crew member's misconduct against passengers, confirms that the *Rivers* Court nowhere approved the application of a negligence standard to situations where a carrier's servant perpetrates an intentional tort against a passenger. As previously noted, *THE MINNETONKA* expressly cited *Brockett* and rejected the notion that a shipowner could escape responsibility to its passengers by claiming that the servant's conduct was outside his or her scope of employment. *Id.*

Given that *Rivers* cited both *Jopes* and *THE MINNETONKA* with approval, it is inconceivable that the *Rivers* Court intended to contravene this Court's express

holding.[7] The controlling Second Circuit precedent follows the *Brockett-Jopes* rule requiring the imposition of strict liability upon a common carrier for the intentional torts of its servants against its passengers.

3. Ninth Circuit

The Ninth Circuit first squarely addressed the subject issue in a 1925 decision. *Sutton*, 7 F.2d 579. There, the plaintiff, a fifteen year old girl, was raped by two of the vessel's crew members. The Ninth Circuit, citing *inter alia Brockett*, reiterated the following strict liability standard:

> [The carrier] by the act of employment vouched for his [the crew member's] deportment during the voyage. A carrier owes a duty to every passenger to protect him from insult and assault. It is a part of the contract of carriage. * * * As long as respondent was a passenger on appellant's ship, appellant owed him a duty of absolute protection from the assaults and aggressions of its servants, and the rule is well nigh universal that the carrier cannot plead as a defense

7. Petitioners' reliance upon two decisions from the United States District Court for the Southern District of New York for the proposition that *Rivers* requires application of a negligence standard in crew member assaults on passengers is misplaced. *York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159 (S.D.N.Y. 1994); *Jaffess v. Home Lines, Inc.*, No. 85-7365, 1988 U.S. Dist. LEXIS 3481 (S.D.N.Y. April 22, 1988). Those decisions contravene this Court's holdings in *Brockett* and *Jopes*, and for this reason alone should be disregarded by this Court. (In fact, neither decision mentions *Brockett* or *Jopes*). Also, those decisions contravene controlling Second Circuit precedent. (In fact, neither decision acknowledges *THE MINNETONKA*). In *Morton*, the Ninth Circuit aptly criticized the New York district court's reliance upon, *inter alia*, *Rivers* to apply a negligence standard in the context of passenger assaults by the ship's crew. 984 F.2d at 292. *Jaffess* and *York* are the product of flawed reasoning at the district court level.

> that the servant acted outside the scope of his employment.

7 F.2d at 580 (citations omitted).

More recently, the Ninth Circuit had the opportunity to reaffirm the legal continuum initiated by *Brockett* and *Jopes* concerning the unconditional liability of the common carriers for the willful misconduct of its servants upon passengers. *Morton*, 984 F.2d 289.

In *Morton*, a passenger was also raped by a crew member of the cruise ship. The Ninth Circuit forcefully reiterated the stringent duty of care applicable to common carriers in the context of crewmembers' wanton assaults against passengers:

> Unlike the invitee/licensee distinction [rejecting an identical *Kermarec* argument made by the cruise line], *the rule regarding absolute liability for crew members' assaults* cannot be traced to obsolete concepts regarding real property and concepts of feudalism. Rather, *it is a widely adopted rule that common carriers owe such an absolute duty to their passengers.* A leading torts treatise explains the general rule: Where the deliberate or willful wrong was not done to further the master's business the tendency has been to deny vicarious liability, but here too there have been many qualifications. The relationship between master and plaintiff may be such as to put on the master a duty of protective care that he may not delegate. Thus a carrier is liable to its passengers for assaults by employees prompted by purely personal motives.

984 F.2d at 292 (emphasis supplied) (citations omitted).

Accordingly, the Ninth Circuit has made it explicitly clear that a common carrier is strictly liable for intentional torts of its servants against its passengers in accordance with the *Brockett-Jopes* rule.

This Court denied *certiorari* in both *Sutton* and *Morton*.

4. Fifth Circuit

The Fifth Circuit has also addressed the issue of a common carrier's strict liability for crew misconduct against passengers. *Tullis*, 397 F.2d at 23. In *Tullis*, the Fifth Circuit observed that admiralty law recognized two separate standards of care, namely, negligence and strict liability, and that strict liability was applicable in adjudicating passenger claims for crew member torts:

> The principles involving liability to passengers differ little from those in use ashore. The liability basis is negligence *with the only apparent exception being the unconditional responsibility of the carrier for the misconduct of the crew toward the passengers.*

Id. (Emphasis supplied). (*See also* App. at 36a). Accordingly, the Fifth Circuit has explicitly recognized the *Brockett-Jopes* rule as being the applicable standard concerning crew member misconduct against passengers.[8]

8. The District Court in this case, while applying the *Brockett-Jopes* standard of care, mistakenly discerned a conflict between the Fifth Circuit and other Circuits concerning the issue of whether the common carrier servant's conduct had to be within the scope of employment before the strict liability standard attached. This perception was based on the Fifth Circuit's decision in *Jackson Marine Corp. v. BLUE FOX*, 845 F.2d 1307 (5th Cir. 1988); but the Eleventh Circuit rejected the notion that *Jackson Marine* (Cont'd)

5. Eighth, Fourth and District of Columbia Circuits

Also illustrating the universal rule that a common carrier is absolutely liable for intentional torts of its servants against passengers are the decisions from the Eighth, Fourth and District of Columbia Circuits. *Gilstrap*, 998 F.2d 559; *Willsie*, 224 F. 908; *Pullman*, 46 F.2d 399; *Matthews*, 157 F.2d 609. (*See also* App. at 30a-31a n.16).

In *Gilstrap*, an Amtrak passenger alleged that she had been sexually assaulted by a train employee while traveling from California to North Dakota. Although *Gilstrap* involved the interpretation of Washington State law, the Eighth Circuit cited with approval "maritime common carrier" decisions in addressing the issue of the correct liability standard to apply. The Eighth Circuit particularly noted a Washington Supreme Court decision, *Marks v. Alaska Steamship Co.*, 71 Wash. 167 (1912), imposing strict liability upon a shipowner for a passenger assault by a crew member. The *Marks* Court held that a passenger had the right to claim "absolute protection" from the shipowner against the assaults and violence of its servants. 71 Wash. at 169.

It is noteworthy that in reaffirming the universal rule of common carrier liability for assaults of its servants against its passengers, the *Marks* court discussed two of the precedents relied upon by this Court in *Jopes*, namely, *Goddard v. Trunk Railway*, 57 Me. 202 (Me. 1869) and *Craker v. Chicago & N.W.R. Co.*, 36 Wis. 657 (Wis. 1875). The *Gilstrap* Court also considered "persuasive authority" the Ninth Circuit's decisions in *Sutton* and *Morton* discussed above. 998 F.2d at 562.

(Cont'd)

was applicable to a cruise line's liability for crew member misconduct against passengers: "*Jackson Marine* is even more inapposite as it involved fraud by a salvage boat captain against the owner of a damaged ship, and in no way involved a common carrier or a passenger." (App. at 41a n.26).

See also Willsie, 224 F. at 911 (*citing, inter alia, Brockett* and *Jopes* for proposition that carrier is liable for "willful and malicious acts of [its] agents, and even though such acts are not done within the scope of their employment").

Further, as the Eleventh Circuit noted, the Fourth Circuit and the District of Columbia Circuit also join with other Circuits in concluding that a common carrier is strictly liable for the intentional torts of its servants against passengers. (App. at 30a-31a n.16, citing the *Pullman* and *Matthews* decisions). In *Pullman*, the Fourth Circuit observed that in cases involving the willful misconduct of a carrier's servants upon passengers, "there may be recovery of actual damages arising from the wrongful act of the servant, notwithstanding such act was beyond the line of duty and the scope of employment and was never ratified by the master." 46 F.2d at 399. Similarly, in *Matthews*, the District of Columbia Circuit, citing *Brockett*, remarked that "[a] common carrier is required to protect its passengers against assault or interference with the peaceful completion of their journey." 157 F.2d at 610-11.

The foregoing analysis confirms that all Federal Circuits that have squarely addressed the issue of the proper standard to apply to intentional torts of common carriers' servants against passengers have followed a rule long ago enunciated by this Court in *Brockett* and *Jopes*.

Petitioners have not presented to this Court *any* authority in which a Circuit Court has refused to apply a strict liability standard in the narrow situation involving the willful misconduct of a common carrier's servants against passengers. Indeed, they cannot. The uninterrupted continuum of authority flowing from the *Brockett* and *Jopes* decisions over the course of some one hundred fifteen years represents the very essence of uniformity required by admiralty law. Accordingly, there is no reason for this Court to review the subject decision which is simply the latest step in that continuum. The petition should be denied.

II. *Kermarec* Is Inapplicable And The Circuits That Have Applied The *Kermarec* Negligence Standard Have Done So Only In Slip And Fall Situations Not To Claims Brought By Passengers For Intentional Torts Perpetrated By A Common Carrier's Servants

Petitioners' reliance upon *Kermarec* is misplaced and the Eleventh Circuit properly held that *Kermarec*, a slip and fall case not involving a passenger, is inapplicable in the context of common carrier liability for the intentional misconduct of its servants against passengers. (App. at 33a-34a).

Kermarec does not apply for various reasons: *Kermarec* had nothing to do with a passenger (App. at 33a); *Kermarec* did not involve an assault upon a passenger by a servant of the common carrier (App. at 34a); *Kermarec* was a garden variety slip and fall case where plaintiff sustained injuries allegedly due to the condition of the ship (App. at 33a-34a,); and *Kermarec* did not discuss either *Brockett* or *Jopes*. As the Eleventh Circuit accurately concluded, "[q]uite simply, there is no indication in *Kermarec* that the Supreme Court intended to eliminate the more stringent rule in *Jopes* imposing liability on a common carrier for its employees' assaults of passengers." (App. at 34a).

That *Kermarec* did not change or eliminate absolute carrier liability for the intentional torts of crew members against passengers is confirmed by the fact that the precedents relied upon by this Court in *Kermarec* were limited to non-intentional personal injury cases. This was so because the narrow issue in *Kermarec*, as stated by this Court, was "whether admiralty recognizes the same distinctions between an invitee and licensee as does the common law." 358 U.S. at 630. After considering this narrow issue, the Court then went on to state that admiralty law need not import the land-

based common law distinctions between "invitees" and "licensees" and concluded "that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632. (*See also* App. at 33a-34a). *Kermarec* merely set forth a minimum standard of care for maritime personal injury cases.

Indeed, *Kermarec* expressly recognized that the minimum duty of care owed by a shipowner to everyone was not universal and that greater duties were owed to persons holding status in various "meaningful categories." While rejecting the old common law distinctions between invitee, licensees and trespasser, this Court observed in a footnote:

> This is not to say that concepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different. Membership in the ship's company, for example, a status that confers an absolute right to a seaworthy ship, is peculiar to the law of the sea. Such status has now been extended to others aboard "doing a seaman's work and incurring seaman's hazards."

358 U.S. at 632 n.9 (citations omitted).

This Court's reference in *Kermarec* to the status of a seamen as an "example" of those "meaningful categories" persuasively demonstrates that the Court did not intend to abolish the long-established precedent of *Brockett* and *Jopes* that a common carrier owes a passenger an absolute right of protection against the misconduct of the carrier's servants, whether or not the misconduct took place outside the scope of employment.

The Ninth Circuit and the Eleventh Circuit agree.

The Ninth Circuit in *Morton*, like the Eleventh Circuit in this case, explicitly rejected the very same argument advanced here by Petitioners that *Kermarec* applies in the context of crew member assaults on passengers. 984 F.2d at 291-92. The Ninth Circuit, citing footnote 9 in *Kermarec*, rejected the notion that *Kermarec* had imposed a universal standard of care regardless of the status of the individual onboard:

> In that note, the Court makes clear that "reasonable care under the circumstances" is not the universal standard of care to be provided aboard ship. A different standard may apply where it makes sense under maritime law.

984 F.2d at 291. In *Morton*, this Court denied *certiorari*.

All of the Circuit Court cases applying the *Kermarec* negligence standard cited in the petition have done so only in the context of passengers suing for damages sustained from either slip and fall or garden variety negligence type injuries rather than in the context of injuries sustained by passengers from the assaults of crew members. *Muratore*, 845 F.2d 347 (applying *Kermarec* standard to passenger's damages for personal injury due to fall, but affirming "unconditional responsibility" for that portion of lawsuit involving liability for separate "misconduct" of crew members); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983) (passenger tripped over stool left on dance floor); *Monteleone v. Bahamas Cruise Line, Inc.*, 838 F.2d 63 (2d Cir. 1988) (plaintiff suffered injuries when she fell down a flight of stairs onboard ship); *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978) (fireman fighting fire onboard vessel injured when falling off ladder); *Beard v. Norwegian Caribbean*

Lines, 900 F.2d 71 (6th Cir. 1990) (passenger injured while playing basketball on the ship's deck); *Urian v. Milstead*, 473 F.2d 948 (8th Cir. 1973) (passenger injured while disembarking from yacht); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332 (11th Cir. 1984) (passengers sued for damages sustained when cruise ship's sanitary system failed).[9]

Although *Kermarec* was handed down over forty-five years ago, Petitioners cannot point to a single Federal Circuit Court that has embraced the argument they advance here; an argument that has been squarely rejected twice in the last twelve years by the Ninth and Eleventh Circuits. On the contrary, even after *Kermarec*, the First (1988), the Fifth (1968), the Eighth (1993), the Ninth (1993) and the Eleventh (2004) Circuits have unambiguously recognized that a common carrier has an unconditional responsibility for intentional torts perpetrated by their servants against passengers. *Muratore*, 845 F.2d 347; *Tullis*, 397 F.2d 22; *Gilstrap*, 998 F.2d 559; *Morton*, 984 F.2d 289; *Doe*, 394 F.3d 891.

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9. Petitioners' reliance on three state cases, which purportedly represent the "modern trend" in admiralty law, is unavailing. *Adams v. New York City Transit Auth.*, 88 N.Y.2d 116 (N.Y. 1996); *Lowrey v. Montgomery Kone, Inc.*, 42 P.3d 621 (Ariz. Ct. App. 2002); *Sebastian v. District of Columbia*, 636 A.2d 958, 962 (D.C. 1994). *Lowrey* involves personal injuries, not intentional torts; *Sebastian*, a case involving a sexual assault by an ambulance attendant, relies purely on District of Columbia law in refusing to apply common carrier doctrine while recognizing that many other state jurisdictions do adhere to that doctrine and apply a strict liability standard; and *Adams*, a case involving an assault perpetrated by a token booth clerk, incorrectly relies on *Kermarec* to justify applying a negligence standard. These decisions contravene admiralty law, are clearly inapposite and/or are the product of flawed reasoning. Viewed properly in the context of the above discussion, they are aberrations and certainly do not constitute "modern maritime law."

Brockett-Jopes and their progeny and *Kermarec* and its progeny constitute two separate branches of admiralty authority that govern separate and distinct issues concerning the duties owed by shipowners to persons onboard their vessels. On the one hand, there is the branch embodied by the *Brockett-Jopes* rule, a strict liability standard for intentional misconduct by servants of common carriers against passengers, the standard of care that Federal Circuits have invariably applied for well over a century. On the other hand, the *Kermarec* rule applies a negligence standard to garden variety maritime personal injury cases, which occur far more frequently. [10] For such negligence cases, which can involve any person on a vessel, not necessarily a passenger, and any type of carrier, not necessarily a common carrier, it is the minimum standard of care (reasonable under the circumstances) that has been consistently applied. Under the principle of *stare decisis*, both branches represent uniformity in the administration of admiralty law, albeit under separate continuums of precedent involving very different issues and types of cases.

Given the inapplicability of *Kermarec* to the present case and the existence of the requisite uniformity in cases such as this one involving intentional torts of common carriers' servants against passengers, no reason exists for this Court to review the Eleventh Circuit's well-reasoned decision.

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10. Thus, Petitioners' recitation of statistics concerning "marine personal injuries" is simply irrelevant, for the instant case involves the commission of an intentional tort perpetrated by a crew member against a passenger.

III. The Public Policy Embodied In *Brockett* And *Jopes* Has Represented Uniformity In Admiralty Law For Well Over A Century And Requires No Review

The *Brockett-Jopes* rule is sound as a matter of policy. The public policy reasoning behind the imposition of the highest standard of care upon a common carrier is that a common carrier assumes an extraordinary undertaking vis-à-vis its passengers, namely, the safe transportation of a passenger to destination free of the willful misconduct of the common carrier's servants. *Brockett*, 121 U.S. 637; *Jopes*, 142 U.S. 18. As the Eleventh Circuit recognized,

> the rationale for imposing strict liability on the common carrier employer is *the carrier-passenger relationship and the corresponding existence of an implied duty of protection and safe transport free from assaults by the carrier's employees during transit.* In terms of tort liability, this becomes in effect, a special non-delegable duty owed by the carrier to the passenger.

(App. at 31a) (Emphasis supplied) (App. 31a-33a n.18-20). *See also Morton*, 984 F.2d at 291 ("contract of carriage made it the duty of the carrier to carry safely and to protect its passenger from violence and insult committed by its own servants") (*quoting Sutton*, 7 F.2d at 580); *St. Michelle v. Catania*, 252 Md. 647, 651 (Md. Ct. App. 1969) ("common carrier is not an insurer of the safety of its passengers, but it is bound to employ the highest degree of care for their safety, consistent with the nature of the undertaking"). (*See* App. at 28a-29a n.13).

In the twilight of the twentieth century and at the dawn of the new millennium, the Ninth and Eleventh Circuits, in separate cases involving sexual assaults by crew members

on passengers, have reaffirmed the vitality of a universal standard that has remained undisturbed for well over one hundred fifteen years as well as the public policy that supports it. Petitioners have provided no reasonable basis which would warrant a review by this Court. Petitioners can do no better than to suggest that the policy has become outdated because certain modes of transportation are "safer" today that they were in the past, which fails to address the core concern of willful misconduct of a common carrier's servants against passengers, as the plaintiff in this very case can attest.

Indeed, there is an element of trust inherent in the common carrier-passenger relationship. That trust is violated when a common carrier's servant commits an intentional tort against its passenger and it is this breach which gives rise to the imposition of the strict liability standard. It is therefore manifest that the purpose of the policy embodied by the *Brockett-Jopes* rule is *not* to protect against natural hazards of certain types of traveling, but rather, to apply an appropriate standard in the event of a breach of the trust created by the common carrier-passenger relationship.

The element of trust is particularly compelling under the facts of the present case. It is clear that Respondent sought the assistance of a crew member (Aydin) precisely because she viewed him as part of the crew and trusted him to offer assistance in her moment of need. As the Eleventh Circuit noted:

> Aydin undisputedly had offered to help Doe in her distress. Aydin even referred to Doe as "his passenger," and there is ample evidence in the record that Doe allowed Aydin to escort her only because he was trusted as her waiter-crew member on the ship.

(App. at 46a; *see also* App. at 13a). Had that element of trust not existed, Respondent would not have accepted Aydin's

proffered assistance and she would not have become the victim of his sexual battery. (App. at 46a).

Accordingly, the sound policy which has been universally applied for over a century in narrow circumstances involving egregious breaches of trust requires no review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

CELEBRITY CRUISES, INC., ZENITH SHIPPING CORP., APOLLO SHIP CHANDLERS, INC., AND CELEBRITY CATERING SERVICES PARTNERSHIP,

Petitioners,

v.

JANE DOE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION OF THE INTERNATIONAL COUNCIL OF CRUISE LINES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE INTERNATIONAL COUNCIL OF CRUISE LINES AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE INTERNATIONAL COUNCIL OF CRUISE LINES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI[1]

Pursuant to Supreme Court Rule 37.2(b), the International Council of Cruise Lines ("ICCL") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for Writ of Certiorari in this case. Petitioner has consented to the filing of this brief. However, Respondent has withheld consent necessitating the filing of this motion.

The ICCL is a non-profit trade association comprised of sixteen major passenger cruise lines and numerous "associate members" with interests related to the cruise line industry. In 2004, over eight million passengers embarked on cruises originating from United States ports of call.[2] This figure represents an increase of almost one million people over the number of passengers embarking in 2003.[3] The increases are expected and projected to continue with newly built ships entering the marketplace to accommodate the growing passenger base. As a unified voice for the competing lines that comprise this dynamic and growing industry, the ICCL is intent on fostering continued economic viability for all of its members and bringing light to the important issues facing those member cruise lines.

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[1] This motion for leave to file this brief as *amicus curiae* is filed simultaneously with the brief.

[2] Business Research & Economic Advisors (BREA), "The Contribution of the North American Cruise Industry to the U.S. Economy in 2004" (August 2005), available at http://www.iccl.org/resources/2004_economic_study.pdf (as of September 15, 2005).

[3] *See id.* at 3.

As a point of reference, in 2004, the North American cruise industry generated roughly $30 billion in total economic benefit for the United States.[4] This $30 billion economic impact supported the employment of more than 315,000 workers and in excess of $12 billion in paid wages and salaries throughout the United States.[5] Moreover, individual state economies benefited from over $14.7 billion worth of direct purchases made in conjunction with the North American cruise industry.[6] Corresponding with their positions as the leading points of embarkation for U.S. passengers, Florida, California and New York received the most economic benefit from the industry.

The ICCL, as an organization driven by the needs of its members, is an active participant in the regulatory and policy development process as it relates to, and impacts, the cruise line industry. The ICCL works directly with federal agencies and international organizations in an effort to ensure that the cruise industry is safe, secure, responsible, and reliable. With respect to domestic policy regulation and implementation, the ICCL coordinates with the U.S. Coast Guard, the Centers for Disease Control and Prevention, the U.S. Department of Agriculture, the U.S. Environmental Protection Agency and other agencies to ensure that its members are in compliance with United States laws, rules and regulations. On a global scale, the ICCL also works closely with the International Maritime Organization and the United Nations to assist its member

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[4] *See id.* at 32-33.

[5] *See id.*

[6] *See id.*

cruise lines in maintaining compliance with international treaties, conventions and protocol.

Because the ICCL represents such a large number of the most traveled cruise lines in the world, it has a direct interest in any final determination of the standard of care applied to a cruise line (employer) in the case of an assault on a passenger by a crewmember (employee). In addition, the ICCL's long history of working with domestic and foreign organizations in all avenues of regulation and policy-making adds to the unique perspective that the organization can provide to any debate on this subject. The ICCL believes that this Court is presented with a significant opportunity to resolve a question that currently confounds the industry. The opportunity presently exists for this Court to clarify the confusion and the conflict in its own precedent and the conflict between the Second Circuit Court of Appeals and both the Ninth and Eleventh Circuit Courts of Appeals.

The relevance of this split among the Circuit Courts of Appeal is particularly significant for the members of the ICCL. The current conflict among the appellate circuits represents increased cost and significant legal uncertainty to the ICCL's member cruise lines. The application of different standards of care in different appellate circuits encourages forum shopping on the part of potential plaintiffs, which is a costly waste of industry and judicial time and resources.

The ICCL believes that its member cruise lines should owe the same duty of care to any customer aboard a cruise vessel, regardless of where that passenger chooses to file suit. This is especially true considering that a lynchpin of the general maritime law, as articulated by this Court on

numerous occasions, is its uniformity across all courts, regardless of location. The unequal treatment of defendants (and plaintiffs) depending solely on where suits are filed is not justified. The unfair, unequal, and substantial economic impact on those cruise lines sued in circuits applying strict liability for assaults on passengers is further compounded when contrasted with the fact that their land-based competitors in the hotel, resort and amusement industries are only held to a standard of reasonable care.

For the stated reasons, the ICCL respectfully requests that this Court grant it leave to file the attached brief in support of the petition for writ of certiorari.

Respectfully submitted,

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QUESTION PRESENTED

WHETHER THE STANDARD OF CARE OWED BY A CRUISE LINE TO A PASSENGER ASSAULTED BY A CREWMEMBER IS REASONABLE CARE UNDER THE CIRCUMSTANCES OR STRICT LIABILITY?

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INTEREST OF *AMICUS CURIAE*[1]

The International Council of Cruise Lines ("ICCL") is a non-profit trade association comprised of sixteen major passenger cruise lines. In addition, the ICCL is comprised of over ninety "associate members," including 3M, American Bureau of Shipping (ABS), American International Group, Inc., Board of Commissioners of the Port of New Orleans, Canaveral Port Authority, Cargill Food Distribution Co., The Coca-Cola Company, Halifax Port Authority, Maine Port Authority, Maryland Port Administration, Massachusetts Port Authority, Port Everglades, Port of Galveston, Port of Houston Authority, The Port of Los Angeles, Port of Miami, The Port of Philadelphia and Camden, a DRPA of PA & NJ, Port of San Diego, Port of Seattle, Quebec Port Authority, and Tampa Port Authority.

The ICCL is an active participant in the regulatory and policy development process as it relates to, and impacts, the cruise line industry. Most importantly, the ICCL works closely with domestic and international authorities to ensure that cruising remains safe, secure, responsible, and reliable for all parties involved.

Because the ICCL is comprised of the sixteen major cruise lines accommodating a majority of the approximately eight million (and rising each year) passengers embarking annually on ships from U.S. ports of call, the ICCL has a significant interest in this Court's determination

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its member cruise lines, or its counsel made a monetary contribution to the preparation and submission of this brief.

of the standard of care owed by a cruise line to a passenger assaulted by the cruise line's employee.[2] Although the ICCL's member cruise lines compete in the marketplace for domestic and foreign leisure travelers, the ICCL acts as a unified and cohesive organization with respect to industry issues and policies. The ICCL has successfully advocated the unified position of its members, while cooperating with domestic and international governing authorities, in such significant areas as safety, public health, environmental responsibility, security, medical facilities, and passenger protection.[3]

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

Common Carrier Passenger Assault Cases at the Supreme Court

At a time when passenger vessels served primarily as a means of transporting people from one destination to another, this Court issued two decisions that address the standard of care owed by a "common carrier" to a passenger assaulted by the carrier's employee ("Passenger Assault Cases"). *New Jersey Steam-Boat Co. v. Brockett*,

[2] Business Research & Economic Advisors (BREA), "The Contribution of the North American Cruise Industry to the U.S. Economy in 2004" p. 7 (August 2005), *available at* http://www.iccl.org/resources/2004_economic_study.pdf (as of September 15, 2005) (finding that the ICCL's member cruise lines "accounted for approximately 62 percent of the North American industry's global fleet, 88 percent of the lower berth capacity and 93 percent of global passengers").

[3] http://www.iccl.org/whoweare/index.cfm (as of September 15, 2005).

121 U.S. 637 (1887) (train passenger) and *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891) (vessel passenger). Citing *Stewart v. The Brooklyn and Cross-Town Railroad Co.*, 90 N.Y. 588, 591 (N.Y. 1882) as support for its position, *Brockett* states the standard of care in Passenger Assault Cases as follows:

> [A] common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect [passengers] against the misconduct of its own servants engaged **in executing the contract.**

121 U.S. at 645-46 (emphasis added).[4]

In quoting *Brockett*, *Jopes* reiterates that "a common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed **in executing the contract of transportation.**" 142 U.S. at 25 (emphasis added). *Jopes* further states the following:

> But owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful, and outside the scope of the employment. **Noticeable instances of this kind are the cases of *Craker v. Railroad Co.*, 36 Wis. 657**, in

[4] The New York Court of Appeals overruled and completely repudiated *Stewart* in *Adams v. New York Transit Authority*, 88 N.Y.2d 116, 117-23 (N.Y. 1996) (*Stewart*'s implied contractual strict liability rule is "fundamentally flawed" and "no longer viable").

> which, when a conductor had forcibly kissed a lady passenger, the company was held responsible for the unlawful assault; **and *Goddard v. Railroad Co.*, 57 Me. 202**, in which, when a brakeman had committed a gross and offensive assault upon an invalid passenger the company was held liable in damages.

142 U.S. at 27 (emphasis added). Although *Brockett* and *Jopes* represent support for a rule of strict liability against common carrier employers in Passenger Assault Cases, an analysis of *Stewart*, *Craker v. Chicago & Northwestern Railway Co.*, 36 Wis. 657 (Wis. 1875) and *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202 (Me. 1869) is necessary to identify their conceptual underpinnings.

Stewart is a New York State railroad case wherein the passenger was attacked and beaten by the conductor. In holding the carrier strictly liable for the intentional tort of its employee, *Stewart* rationalizes its finding of strict liability based on the carrier's contractual duty to absolutely protect its passengers from assaults by its employees. 90 N.Y. at 590-91. Similarly, *Craker* explains that a carrier is strictly liable for the misconduct of its agents, regardless of whether the agent acts outside the scope of the agent's employment, based on the stipulation for safe passage implied in the contract of carriage. 36 Wis. at 671-72. And again, *Goddard* finds carriers strictly liable in Passenger Assault Cases because "the carrier's implied promise [of safety] is broken." 57 Me. at 217-18. Thus, this Court's 19th Century opinions spawned a rule that a common carrier is strictly liable for assaults against passengers by its employees based on the duty of safe passage implied in the contract of carriage ("Implied Contractual Strict Liability Rule").

The first indication that this Court no longer supports the Implied Contractual Strict Liability Rule but recognizes "negligence" in passenger cases appears in *The Admiral Peoples*, 295 U.S. 649 (1935).[5] Although the Implied Contractual Strict Liability Rule is not addressed directly, *The Admiral Peoples* discusses a "negligence" standard and makes no reference to strict liability or any implied contractual responsibility. 295 U.S. at 652. Without providing any guidance regarding the fate of Implied Contractual Strict Liability Rule, no further "passenger cases" were decided by this Court until *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1958).[6]

In *Kermarec*, this Court articulated a rule of law that is inconsistent with the Implied Contractual Strict Liability Rule. As *Kermarec* explains in one simple sentence:

> It is a settled principal of maritime law that a shipowner owes the duty to exercise reasonable care towards those lawfully aboard the vessel who are not members of the crew.

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[5] Prior to *Brockett* and *Jopes*, but not in a passenger case, this Court issued an opinion that referred to traditional "negligence" as the proper standard of care in a claim by a shipboard visitor against a vessel owner. *Leathers v. Blessing*, 105 U.S. 626 (1881).

[6] Excluding Passenger Assault Cases, *Kermarec* is recognized in every circuit issuing an opinion as setting the standard in "passenger cases." *In re Catalina Cruises, Inc.*, 137 F.3d 1422 (9th Cir. 1998); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 73-74 (6th Cir. 1990); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989); *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988); *Smith v. Southern Gulf Marine Company No. 2*, 791 F.2d 416 (5th Cir. 1986); *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169 (2d Cir. 1983); *Urian v. Milstead*, 473 F.2d 948 (8th Cir. 1973).

358 U.S. at 630 (emphasis added). In support of the *Kermarec* reasonable care standard ("Reasonable Care Rule"), this Court cites *Leathers v. Blessing*, 105 U.S. 626 (the visitor negligence case from the 1800's), *The Max Morris v. Curry*, 137 U.S. 1 (1890) (a longshore negligence case) and *The Admiral Peoples*, 295 U.S. 649 (the passenger "negligence" case from 1935).

Unfortunately, *Kermarec* failed to address the status of the Implied Contractual Strict Liability Rule. This Court's failure to discuss the status of the Implied Contractual Strict Liability Rule in *Kermarec* created the current conflict and confusion regarding whether the Implied Contractual Strict Liability Rule or the Reasonable Care Rule applies in Passenger Assault Cases.

II.

Importance, Uniformity and Fairness

This Court is presented with an opportunity to clarify the outdated, conflicting, and confusing legal concepts and precedent that currently confound the cruise line industry and its customers. *See Brockett*, 121 U.S. at 637; *Jopes*, 142 U.S. at 18; *Kermarec*, 358 U.S. at 625. The present uncertainty with respect to the standard of care in Passenger Assault Cases is contrary to the general maritime law's goal of uniformity. *See The Lottowanna*, 88 U.S. 558, 575 (1874); *American Dredging Co. v. Miller*, 510 U.S. 443, 450-51 (1994). As such, every court should apply a uniform standard of care in Passenger Assault Cases, no matter where the court is located. *See The Lottowanna*, 88 U.S. at 575; *American Dredging Co.*, 510 U.S. at 450-51. Uniformity is particularly important to cruise lines because their vessels sail from numerous different domestic and foreign

ports, often changing itineraries depending on the different sailing seasons.

The imposition of a strict liability standard in Passenger Assault Cases (as opposed to a standard of reasonable care under the circumstances) contravenes the realities of the present cruise industry. Application of the Implied Contractual Strict Liability Rule in Passenger Assault Cases based on its outdated theoretical underpinnings is unjust in light of the modernization and regulation of the cruise industry. In addition, forcing cruise lines to contend with a regime of strict liability increases the cruise lines' costs of operation, increases ticket prices, forces consumers to pursue other vacation options, and depresses the entire industry.

Fairness dictates that cruise lines should not become insurers in Passenger Assault Cases based on concepts that emerged in the 1800's for stagecoaches, railroads, riverboats, and ocean steamers. *See Stewart*, 90 N.Y. at 593-94, *Craker*, 36 Wis. at 674; *Goddard*, 57 Me. at 212-13. The present reality is that cruise lines and cruise vessels no longer function to transport passengers from a point of embarkation to a final destination. *See Spector v. Norwegian Cruise Line, Ltd.*, 125 S. Ct. 2169 (2005). Most cruises begin and end at the same port of call. As this Court recently noted, "**[Cruise] ships are essentially floating resorts. They provide passengers with staterooms or cabins, food, and entertainment.**" *Spector*, 125 S. Ct. at 2175 (emphasis added).

Cruise vessels are destinations in themselves, with the shipboard time spent between ports of call functioning as the true vacation and entertainment experience. With arcades, art galleries, bars, basketball courts, casinos,

exercise equipment, ice skating rinks, jogging tracks, miniature golf courses, movie theatres, restaurants, rock climbing walls, shopping malls, shoreside excursions, swimming pools, and spas, a cruise vessel is significantly more than a means of transportation. *See Spector*, 125 S. Ct. at 2175. A cruise vessel is an amenity-filled resort style vacation destination, just like a hotel on the beach, a Las Vegas casino, or a trip to an amusement park. However, the law subjects hotels, casinos, and amusement parks only to a reasonable care standard with regard to assaults on guests and visitors.[7] No rational basis remains for applying a different standard of care to landside vacation destinations and "resorts that float."

In 2004, 192 cruise ships operating in the North American cruise industry carried a total of 10.85 million passengers.[8] The industry now plans to add twenty-four new ships and 64,652 new berths to its fleet capacity through 2008.[9] With 8.1 million of these passengers embarking from ports in the United States, cruising has become a form of leisure for a significant number of Americans.[10] In addition, the ICCL members employ approximately 120,000 shipboard employees. However, of these 120,000 shipboard employees, only a limited percentage is actually employed in positions relative to the navigation and transportation functions of the vessel.

The vast majority of shipboard employees attend to non-navigational and non-transportation duties. These

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[7] *See* RESTATEMENT (SECOND) OF TORTS § 344 cmt. b (1965).

[8] Business Research & Economic Advisors (BREA), *supra*.

[9] *See id.* at 99.

[10] *See id.* at 3.

employees ensure that the vacationers experience an enjoyable cruise. For example, the entertainers, bartenders, waiters, room stewards, wait staffers, retail sales associates, blackjack dealers, hair stylists, and fitness instructors, etc. are all on board the cruise vessel to perform the same role as if they were employed at a landside resort.

The rationale in prior precedent supporting the Implied Contractual Strict Liability Rule rests on the alleged isolation and vulnerability of the passengers. *See Stewart,* 90 N.Y. at 593-94; *Craker,* 36 Wis. at 674; *Goddard,* 57 Me. at 212-13. However, this line of reasoning crumbles in view of the modern amenities currently available on cruise ships, including the latest in communications technology. Isolation is non-existent as passengers spend a significant portion of their cruise vacation in common areas and reach a new port of call virtually every day. Cellular telephones, which did not exist in the 1800's, are now ubiquitous and provide another potential option for passengers while cruise ships are in port.

As a practical matter, a cruise vessel should be safer than any other vacation destination because every individual on the vessel is known and accounted for. Like a gated community, crewmember and passenger embarkations and disembarkations are monitored and electronically recorded. With a limited pool of passengers and crew and significant security restrictions regarding who can "come and go" from cruise ships, passengers are afforded even more protection than landside resort vacation-goers. Moreover, all ICCL members and most other cruise lines subject their employees to pre-employment background checks, including rigorous criminal scrutiny. Therefore, the Implied Contractual Strict Liability Rule is obsolete,

outmoded, and contrary to the realities of cruising in 2005 and beyond.[11]

In addition, ICCL member cruise lines have, in fact, adopted a zero tolerance policy for crimes committed on their vessels. This policy for reporting and investigating all alleged shipboard crimes exists to protect all passengers. A unique statutory regime provides the Federal Bureau of Investigation with specific jurisdiction to investigate and prosecute crimes involving U.S. citizens even when occurring on the high seas, in foreign territories, or on foreign-flagged vessels. *See* 18 U.S.C. § 7 (2001). Likewise, 14 U.S.C. § 89 (1949) grants the U.S. Coast Guard the authority to investigate crimes and enforce U.S. laws on the high seas in conjunction with the FBI's authority and jurisdiction. With all of the present protections in place, the notion that vulnerable and isolated passengers will fall prey to cruise line employees thereby warranting a strict liability standard is no longer valid. In view of the true nature of the current cruise line fleet and the pervasive presence of U.S. police authority, 19th Century policy supporting strict liability in Passenger Assault Cases is now moot.

Cruise lines do not compete with airlines, trains or automobiles for the actual transportation of passengers.

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[11] Based on information received by the ICCL from the Federal Bureau of Investigation ("FBI"), the FBI investigates approximately thirty-five allegations of passenger vessel assaults per year. This number is quite low in view of the eight to ten million passengers who annually sail on cruise ships. Based on this low frequency of allegations, which range from alleged verbal confrontations to unwanted physical contact, there exists no justification for imposing the heightened strict liability standard on cruise lines while land-based resorts are subject to a standard of reasonable care.

Instead, cruise lines compete with hotels, resorts, and entertainment venues for vacation, holiday, and leisure enthusiasts. In view of the foregoing business environment, no policy justification exists for imposing the Implied Contractual Strict Liability Rule on cruise lines while their competitors (hotels, casinos, resorts, amusement parks, and entertainment venues) are subject to only the traditional negligence standard, the standard of reasonable care under the circumstances.[12] This case presents the Court with the opportunity to clarify and harmonize this conflicted and confusing area of law by embracing the Reasonable Care Rule set forth in *Kermarec*, 358 U.S. at 625.

III.

Conflict or Confusion at the Supreme Court

Whether *Kermarec* is in direct conflict with *Brockett* and *Jopes* or this Court intended for the two lines of cases to awkwardly coexist is unclear. However, in view of the archaic legal concepts and policies underlying *Brockett* and *Jopes* and in view of the modern tort principles articulated in *Kermarec*, the stronger argument is that the Implied Contractual Strict Liability Rule and the *Kermarec* Reasonable Care Rule conflict.

Kermarec holds as follows:

> [T]he owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising

[12] *See* RESTATEMENT (SECOND) OF TORTS § 344 cmt. b (1965).

> reasonable care under the circumstances of each case.

358 U.S. at 632 (emphasis added). Conversely, as above, *Brockett* and *Jopes* conclude that a common carrier has an implied contractual duty to absolutely protect its passengers from assaults from crewmembers. *Brockett* explains the Implied Contract Strict Liability Rule as follows:

> The [passenger] was entitled, **in virtue of that contract, [of carriage]** to protection against the musconduct [sic] or negligence of the carrier's servants. **Their misconduct** or negligence while transacting the company's business, and when acting within the general scope of their employment, is of necessity to be imputed to the corporation, **which constituted them agents for the performance of its contract with the passenger.**

121 U.S. at 645 (emphasis added). *Jopes* further explains that "[a common] carrier is liable for every conceivable wrongful act done to a passenger by its [employees] while they are engaged in transporting [the passenger]." 142 U.S. at 112. In "coming to grief" on the facts, *Jopes* ultimately holds that a common carrier **does not "[break] his contract of carriage"** if the assault on the passenger by the carrier's employee was justified by the passenger's conduct. 142 U.S. at 112 (emphasis added).

In the end, either *Brockett* and *Jopes* (and the Implied Contractual Strict Liability Rule) are in direct conflict with *Kermarec* (and the Reasonable Care Rule) or the relationship between the cases remains hopelessly confused. Either

way, intervention by this Court is necessary to resolve the conflict or confusion.[13]

IV.

Conflict Among the Circuit Courts of Appeals

Although whether the Supreme Court cases are in direct conflict or hopelessly confused is debatable, the conflict between the Second Circuit Court of Appeals ("Second Circuit") and both the Ninth and Eleventh Circuit Courts of Appeals ("Ninth and Eleventh Circuits") is stark. *Compagnie Generale Transatlantique v. Rivers*, 211 F. 294 (2d Cir. 1914); *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993); *Doe v. Celebrity Cruises Inc.*, 394 F.3d 891 (11th Cir. 2004).

In *Compagnie Generale Transatlantique*, a passenger sailing on a vessel from New York to Europe was assaulted by a crewmember. 211 F. at 297-98. In affirming the trial court's jury instruction, *Compagnie Generale Transatlantique* states the following:

> **Therefore [the District Court] was most careful**, even at the risk of giving some sound exceptions to plaintiff, **to impress upon the jury that there could be no recovery unless the proofs showed some specific neglect in exercising that degree of care which reasonable prudence would require of a carrier**

[13] Resolution between the 19th Century Implied Contractual Strict Liability Rule and the *Kermarec* Reasonable Care Rule is particularly appropriate in view of the repudiation of *Stewart* by the New York Court of Appeals in *Adams*, 88 N.Y.2d at 117-23. *Stewart* underpinned *Brockett* and *Brockett* was the key support relied upon in *Jopes*.

> **obligated to be watchful and vigilant to protect its sleeping passengers.**

211 F. at 299 (emphasis added).

In the Second Circuit, the district courts have understandably read *Kermarec* and *Compagnie Generale Transatlantique* to require the application of the Reasonable Care Rule in Passenger Assault Cases. *Jaffes v. Home Lines, Inc.*, 1990 AMC 1430 (S.D.N.Y. 1988) ("some 'specific neglect' on the part of the shipowner must be shown before the shipowner can be held liable, even for an intentional assault"); *York v. Commodore Cruise Line*, 863 F. Supp. 159 (S.D.N.Y. 1994) ("There must be some failure to exercise due care before liability may be imposed in an intentional assault case").

In conflict with the Second Circuit, the Ninth Circuit completely accepts and endorses the Implied Contractual Strict Liability Rule. *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925). In rejecting even the notion that crewmember assaults on passengers are an action **arising in tort**, *Sutton* states as follows:

> [I]n our view, **by the sale of the ticket there arose a contractual relationship between the company and the passenger**, to which relationship the law by its own force annexed certain implied obligations and duties to be observed and performed by the parties, respectively, toward each other. **The contract of carriage made it the duty of the carrier to carry safely and to protect its passenger from violence and insult committed by its own servants.**
>
> * * *

> **A carrier owes a duty to every passenger to protect him from insult and assault. It is a part of the contract of carriage.**
>
> * * *
>
> **It therefore follows that the court was right in treating the case as in contract, controlled by the general principles stated.**

7 F.2d at 580 (emphasis added). Notwithstanding the interim decision in *Kermarec*, *Morton* unequivocally adopts the Implied Contractual Strict Liability Rule set forth in *Sutton*. *Morton*, 984 F.2d at 290.

In the Eleventh Circuit, *Doe* "agree[s] . . . that the age of the *Brockett* and *Jopes* decisions and the intervening decision in *Kermarec* suggest that the Supreme Court might well reconsider its former rulings were an opportunity to arise." 394 F.3d at 909. Notwithstanding the foregoing admission, the Eleventh Circuit adopts the Implied Contractual Strict Liability Rule. *Doe*, 394 F.3d at 909. In reaching its decision, *Doe* attempts to diminish *Kermarec* by quoting frequently from *Brockett*, *Jopes* and *Sutton*. *Doe* states as follows:

> [Even] if the passenger's injuries 'were directly caused by the improper conduct of the carrier's servants, . . . [the passenger] is not precluded from claiming **the benefit of the contract for safe transportation**.'
>
> * * *
>
> **A common carrier's strict liability** to a passenger for crew member assaults during transit **rests upon its special implied duty of protection and safe transport** that it owes as a

> common carrier through its employees to its passengers . . .
>
> * * *
>
> **[W]hile it is the contract for safe transportation that creates an implied duty** on the part of the common carrier to protect and safely transport its passengers, the 'breach of the carrier's duty is a maritime tort.'

394 F.3d 904-05, 907 (emphasis added).

At the end of the day, the liability standard applied in a Passenger Assault Case will depend entirely on the Circuit where the suit is filed. In the Second Circuit, the standard is reasonable care under the circumstances. *Compagnie Generale Transatlantique*, 211 F. at 294; *Jaffes*, 1990 AMC at 1430; *York*, 863 F. Supp. at 159. In the Ninth and Eleventh Circuits, the Implied Contractual Strict Liability Rule will apply. *Sutton*, 7 F.2d at 579; *Morton*, 984 F.2d at 289.

Although the Fifth, Sixth and Eighth Circuits cite *Kermarec* in holding cruise ship owners to a standard of reasonable care under the circumstances, no specific decisions exist in those circuits regarding Passenger Assault Cases. *Smith v. Southern Gulf Marine Co.*, 791 F.2d 416, 421 (5th Cir. 1986); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 74 (6th Cir. 1990); *Urian v. Milstead*, 473 F.2d 948, 950-51 (8th Cir. 1973). Absent further guidance by this Court, whether the Fifth, Sixth and Eighth Circuits will adopt the Reasonable Care Rule or the Implied Contractual Strict Liability Rule remains unknown.

Similarly, some courts conclude that the First Circuit Court of Appeals adopted the Implied Contractual Strict Liability Rule in *Muratore*, 845 F.2d at 353. However, *Doe*

recognizes the inconsistency in *Muratore*. 394 F.3d at 912 n.27. Specifically, *Muratore* states that the district court was correct in finding that "a maritime carrier has an 'unconditional responsibility for the misconduct of its people toward the passengers.'" 845 F.2d at 353 (quoting *Muratore v. M/S SCOTIA PRINCE*, 656 F. Supp. 471, 479 (D. Me. 1987)). Then, *Muratore* opines as follows:

> It is axiomatic in maritime law that a carrier owes a duty of exercising reasonable care towards its passengers under the circumstances. *Kermarec v. Compagnie Generale Tranatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959).

845 F.2d at 353. After noting the inconsistency in *Muratore* between the Implied Contractual Strict Liability Rule and the Reasonable Care Rule, *Doe* cavalierly concludes that "[i]n the end, the First Circuit's *Muratore* decision at worst points in both directions: unconditional responsibility and reasonable care under the circumstances." 394 F.3d at 912 n.27.

In view of the deep roots and history of the conflict and confusion in Passenger Assault Cases, it is incumbent on this Court to restore clarity and uniformity among the Circuit Courts of Appeals by stating clearly whether the Reasonable Care Rule or the Implied Contractual Strict Liability Rule applies.[14]

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[14] In addressing the standard of care in Passenger Assault Cases, the highest appellate court in Florida to address the issue has determined that existing Supreme Court and Circuit Courts of Appeals' precedent is so conflicting and confused that Florida is entitled to apply its own law without offending uniformity. *Nadeau v. Costley*, 634 So.2d 649, 652-53 (Fla. Dist. Ct. App. 1994). However, *Nadeau's* criticism regarding the confusion and conflict at the federal level fails to acknowledge similar

(Continued on following page)

CONCLUSION

Cruise lines compete with hotels, resorts, amusement parks, and other entertainment venues for vacationers and travelers. Applying different standards of care for cruise lines as compared to hotels, resorts, amusement parks, and other entertainment venues is based on archaic policy considerations and is unjust. Furthermore, the existing Supreme Court precedent is either conflicting or hopelessly confused. The Circuit Courts of Appeals are in conflict. The Supreme Court should grant the petition for certiorari to clarify this important area of maritime law.

Respectfully submitted,

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confusion and conflict among Florida's own courts. Compare *Nadeau* and *Commodore Cruise Line, Ltd. v. Kormendi*, 344 So.2d 896 (Fla. Dist. Ct. App. 1977) (adopting the Implied Contractual Strict Liability Rule) with *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So.2d 488 (Fla. Dist. Ct. App. 1986) (adopting *Kermarec*'s Reasonable Care Rule) and *Bradley v. Guy*, 438 So.2d 854 (Fla. Dist. Ct. App. 1983) (acknowledging the Reasonable Care Rule).

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No. 05-121

IN THE

Supreme Court of the United States

CELEBRITY CRUISES, INC., ET AL.,

Petitioners,

v.

JANE DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition is nonresponsive. After petitioners explained that the underpinnings of this Court's nineteenth-century decisions in *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887), and *New Orleans & Northeastern Railroad Co. v. Jopes*, 142 U.S. 18 (1891), had been greatly eroded and are no longer tenable today, respondent offers no meaningful justification for their continuing application. Nor does respondent explain why a harsher standard of liability should be imposed against a cruise line than against a hotel for identical torts committed by their employees that act as waiters, bellhops, or cleaners. Similarly, respondent does not respond to petitioners' point that the legal regime that she and the Eleventh Circuit have embraced creates the anomalous result that cruise ships face strict liability for the types of dangers that they are least able to control (sexual assaults committed against passengers by off-duty crew members, even while ashore) but face a negligence standard for dangers arising from the condition of the vessel that presumably are more likely to be within the ship's control. Moreover, respondent refuses to address the conflict between the Eleventh Circuit's decision below (as well as the Ninth Circuit's decision in *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993)) and the line of cases originating from the Second Circuit in which lower federal courts ask whether the passenger's injury is unique to the cruise ship environment or whether it stems from a danger that is just as likely to arise on land.

Instead of engaging on any of these fundamental issues raised in the petition, respondent devotes her twenty-five page opposition to defending the correctness of the Eleventh Circuit's decision based on the *assumption* that this Court's nineteenth-century precedent remains controlling and by drawing factual distinctions between that precedent and this Court's intervening 1959 decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Re-

spondent's arguments are misdirected and provide no basis for this Court to overlook the strong reasons for granting review that are set forth in the petition.

I. This Court's Review Is Warranted To Reconcile *Brockett* And *Jopes* With The Modern Rule Enunciated In *Kermarec*.

The question presented in this case is whether the strict liability standard set forth in this Court's nineteenth-century jurisprudence *remains* the proper standard to apply in cases in which a cruise line's crew member commits an intentional tort against a passenger. This Court's holding in *Kermarec* that a shipowner "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case," 358 U.S. at 632, stands in tension with *Brockett* and *Jopes*, as the Eleventh Circuit expressly recognized when it noted that this Court might well reconsider those nineteenth-century precedents. Pet. App. 35a. Ignoring the obvious tension, respondent does little more than offer *ipse dixit* assertions to support the continuing validity of *Brockett* and *Jopes*. Indeed, respondent has no explanation for why *Kermarec*'s reasonable standard of care under the circumstances approach should not apply in this case.

1. In her brief in opposition, respondent seeks to portray a settled legal landscape in which "two separate standards in admiralty law" have emerged. Opp. 3. According to respondent, a negligence standard applies in "garden variety maritime personal injury cases," while a higher, strict liability standard applies "only" when "a common carrier's servant" commits "an intentional tort . . . against a passenger during a voyage." *Id.* Although respondent acknowledges that the "negligence standard" has been widely applicable "since 1959" under *Kermarec*, *id.*, she contends that *Brockett* and *Jopes* "have withstood the test of time" and remain applicable in a "very specific situation." Opp. 2, 3. Despite the evident discord between these "two separate standards in admiralty law," respondent surprisingly claims that "*Brockett* and

Jopes have achieved . . . uniformity in admiralty law." Opp. 2. Whatever else might be said of respondent's interpretation of the current state of the law regarding the applicable standard of care that shipowners owe to their passengers, she plainly cannot plausibly claim that the development of "two separate standards" provides "uniformity." Indeed, precisely because there is no valid justification for imposing "two separate standards" of liability, this Court should review the Eleventh Circuit's decision below in order to ensure a more consistent approach in this area of the law.

2. Nor does respondent's feeble appeal to policy considerations hold together. In seeking to explain this Court's nineteenth-century thinking in establishing the standard imposed by *Brockett* and *Jopes*, respondent emphasizes the "special relationship that exists between a common carrier and its passenger," the "'peculiar circumstances' that surround the transportation of passengers," and the "trust inherent in the common carrier-passenger relationship," as the foundations for applying a strict liability standard. Opp. 6, 7, 24. That rationale proves too much, however, as respondent herself acknowledges when she notes that such "broad policy" considerations "nevertheless" have been given "an extremely narrow application." Opp. 8. Indeed, the three foundational bases that respondent identifies in support of a strict liability standard would seemingly require application of that standard in all cases involving passenger injuries, including the "slip and falls" that respondent concedes are governed by *Kermarec*'s reasonable care standard. Respondent has no explanation for that paradox, nor does she respond to petitioners' argument that the considerations that led to the strict liability standard are no longer viable grounds for justifying such a rule.

Similarly, rather than respond to the substance of petitioners' discussion of the modern trend in related areas of the common law to move away from the strict liability rules of the nineteenth century, Pet. 15-17, respondent simply dismisses the three state court examples given by petitioners as

"aberrations" that "contravene" respondent's view of the law. Opp. 21 n.9. Again, that is no answer at all.

3. Respondent's attempt to distinguish *Kermarec* rests on four rickety factual legs, none of which can support her theory: (1) "*Kermarec* had nothing to do with a passenger"; (2) "*Kermarec* did not involve an assault upon a passenger"; (3) "*Kermarec* was a garden variety slip and fall case where plaintiff sustained injuries allegedly due to the condition of the ship"; and (4) "*Kermarec* did not discuss either *Brockett* or *Jopes*." Opp. 18. To be sure, the facts in *Kermarec* were not identical to those presented in this case, or to the facts in *Brockett* or *Jopes*, but such factual distinctions do not mean that the *rationale* of *Kermarec* does not apply here. Even respondent later retreats from her contention that *Kermarec* is limited to non-passenger cases. Opp. 20. In the end, respondent reverts to circular reasoning by citing to the Eleventh Circuit's decision below and the Ninth Circuit's decision in *Morton* as support for her contention that *Kermarec* does not apply in this case. Opp. 20-21. Of course, the Eleventh Circuit's refusal to apply *Kermarec* in this case (consistent with the Ninth Circuit's approach in *Morton*) frames the question for this Court; it does not provide the answer.

4. Respondent's attempt to rely on more recent sources of authority to support application of a strict liability standard is equally unconvincing. These authorities provide no independent justification whatever for applying that rule in cases involving intentional torts committed by crew members against passengers, but simply cite to *Brockett* and *Jopes* as standing for an anomalous result in a discrete set of cases. For example, respondent cites to a footnote in Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, § 1-10 at 23 n.77 (2d ed. The Foundation Press 1975), which first explains that the principles governing liability to passengers "differ little from those in use ashore" because they are based in "negligence." Opp. 9-10. The treatise then notes in a parenthetical that the "only apparent exception" to the negligence rule is that *Brockett*'s strict liability standard has been applied in cases involving the misconduct of a common car-

rier's employees toward a passenger. Opp. 10.[1] Significantly, Gilmore and Black never attempt to defend application of the *Brockett* standard and, indeed, relegate their discussion of that outdated rule to one sentence in a parenthetical found in a footnote.

Petitioners do not deny the existence of *Brockett*, they simply ask this Court to clarify that courts no longer need to apply this "only apparent exception" to the otherwise universal reasonable care under the circumstances standard.[2]

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[1] As respondent's discussion of the Fifth Circuit's decision in *Tullis v. Fidelity & Cas. Co.*, 397 F.2d 22 (5th Cir. 1968), indicates, *Tullis* merely recites the same language found in Gilmore and Black's treatise. Opp. 15. *Tullis* does not cite *Brockett* or *Jopes*, does not involve any actions by a crew member, and its passing reference to crew member misconduct as "the only apparent exception" to a negligence standard simply cannot be read as a post-*Kermarec* Fifth Circuit endorsement of the strict liability standard. *Cf.* Opp. 21.

[2] Respondent also confuses two distinct concepts related to the application of the strict liability standard when an intentional tort is committed by a crew member "outside the scope of his employment." Respondent quotes from *THE MINNETONKA*, in which the Second Circuit rejected as an "archaic doctrine" the notion "that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside of the scope of his authority and thus releases his employer from liability." Opp. 11 (quoting *THE MINNETONKA*, 146 F. 509, 513 (2d Cir. 1906)); *see also* Opp. 12. Respondent then seeks to attribute this rejected view to petitioners. Opp. 11 n.5. But the concept rejected in *THE MINNETONKA* is quite different from the one advanced by petitioners in this case. Petitioners do not contend that *every* assault by a crew member would necessarily constitute an act outside the scope of his authority for which a cruise ship would not be liable, but rather that an assault committed by a waiter while *not on duty* and *off the ship altogether* constitutes an act that is committed outside the scope of employment and should not be imputed to the cruise ship. Neither *Brockett* nor *Jopes* evidence any intent to hold a cruise ship strictly liable in such a situation.

II. This Court's Review Is Warranted To Resolve The Split Among The Federal Courts.

1. As explained in the petition, the decision below conflicts with the analytical approach that most courts have employed since *Kermarec*. This post-*Kermarec* line of authority calls for the application of a reasonable care under the circumstances standard in passenger cases in which courts must take account of whether the particular danger confronting the passenger is "different from those encountered in daily life" or otherwise "peculiar to maritime travel." *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 172 (2d Cir. 1983); *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988).[3]

Since *Kermarec*, the First, Second, Fifth, and Sixth Circuits have all framed the issue in that manner. *See Muratore v. M/S Scotia Prince*, 845 F.2d 347, 353 (1st Cir. 1988) (explaining that "the degree of care required must be in proportion to the apparent risk"); *Rainey*, 709 F.2d at 172 ("The extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger, will determine how high a degree of care is reasonable in each case."); *Monteleone*, 838 F.2d at 65 (applying *Rainey* standard); *Smith v. Southern Gulf Marine Co. No. 2, Inc.*, 791 F.2d 416, 421 (5th Cir. 1986) (agreeing with *Rainey* standard); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 74 (6th Cir. 1990) (applying

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[3] Respondent contends that *THE MINNETONKA*, 146 F. 509 (2d Cir. 1906), is the "controlling Second Circuit precedent" on the question of the proper standard of care that shipowners owe their passengers. Opp. 10. Respondent places undue emphasis on that case. *THE MINNETONKA* was decided in 1906, more than 50 years before this Court's decision in *Kermarec*. Calling a case that pre-dates *Kermarec* by 50 years the "controlling" precedent is untenable. Indeed, the Second Circuit no longer follows the rule set forth in *THE MINNETONKA*, and thus explained in *Monteleone* that "[a]lthough some older cases called for a higher degree of care aboard ship, it is now clear in this Circuit that the appropriate standard is one of reasonable care under the circumstances." *See Monteleone*, 838 F.2d at 64-65 (citing *Rainey*, 709 F.2d at 172).

Rainey standard).[4] Other circuits have similarly applied the *Kermarec* standard in cases in which plaintiffs' injuries were just as likely to occur on land as at sea. *E.g.*, *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978) (fire-fighter's ladder slipped out of position causing him to fall); *Urian v. Milstead*, 473 F.2d 948 (8th Cir. 1973) (plaintiff passenger fell while attempting to disembark boat).

In contrast, when faced with crew member assaults on passengers, the Ninth Circuit and the Eleventh Circuit have not analyzed whether the risk of being assaulted is a danger to passengers that is in any sense "peculiar" to maritime travel. *See Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993); Pet. App. 1a-54a.[5] It plainly is not.

In her opposition, respondent does not address whether the Eleventh Circuit's failure to consider whether assaults are "peculiar" to maritime travel conflicts with the approaches used by other federal courts since *Kermarec*. Instead, respondent attempts to dismiss cases like *Rainey* and *Monteleone* because the facts of those cases did not involve crew member assaults, and thus she maintains that the rule ex-

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[4] In her brief in opposition, respondent mischaracterizes the First Circuit's decision in *Muratore* as applying the *Kermarec* standard to a passenger's damages resulting from a fall, but not for the intentional torts committed against the passenger by the ship's crew members. Opp. 20. The *Muratore* decision has some inconsistent language, but it is clear that its discussion of the *Kermarec* standard was made in the context of whether the ship and its crew members provided the passenger with the "courtesy and consideration" to which she was entitled. *Muratore*, 845 F.2d at 354. Questions of "courtesy and consideration" were plainly related to the hostility that the passenger received from the ship's photographers, and not to her unrelated fall on a stairwell.

[5] Respondent's suggestion that this Court's denial of certiorari in the *Sutton* and *Morton* cases from the Ninth Circuit requires denying the petition in this case is unsupportable. Opp. 8, 15. Indeed, to the extent it should have any bearing on this Court's decision, the fact that similar questions have been the subject of prior petitions for certiorari only *highlights* the importance and recurring nature of the question presented in this case, and favors granting the petition.

pressed in those cases would not apply here. But respondent reads the Second Circuit precedent too narrowly. *Rainey* and *Monteleone* require application of the reasonable care under the circumstances standard in all passenger cases, and the courts in the Second Circuit have recognized that the standard applies even in the context of crew member assaults. *See Jaffess v. Home Lines, Inc.*, 1988 WL 42049, 1990 A.M.C. 1430 (S.D.N.Y. Apr. 22, 1988); *York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159 (S.D.N.Y. 1994).[6]

2. Respondent's attempt to demonstrate an absence of conflict among the federal courts of appeals relies in large part on pre-*Kermarec* cases. Opp. 8 (citing, for example, *THE MINNETONKA*, 146 F. 509 (2d Cir. 1906); *Kansas City S. Ry. Co. v. Willsie*, 224 F. 908 (8th Cir. 1915); *Pacific S.S. Co. v. Sutton*, 7 F.2d 579 (9th Cir. 1925); *Pullman Co. v. Hall*, 46 F.2d 399 (4th Cir. 1931); *Matthews v. Southern Ry. Syst.*, 157 F.2d 609 (D.C. Cir. 1946)). Of course, those cases are not relevant to the question presented in the petition, which turns on whether or not to apply the *Kermarec* standard to all torts committed on cruise ships.

Respondent also identifies five post-*Kermarec* cases that she contends "have unambiguously recognized that a common carrier has an unconditional responsibility for intentional torts perpetrated by their servants against passengers." Opp. 21. With the exception of the Ninth Circuit's decision in *Morton* and the Eleventh Circuit's decision below in this case, the other three decisions that respondent cites do not support her position. As explained *supra* note 1, the Fifth Circuit's decision in *Tullis* simply makes a passing remark

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[6] Although acknowledging in a footnote that *Jaffess* and *York* applied a negligence standard in cases involving crew member assaults on passengers, and thus stand in direct conflict with the Eleventh Circuit's approach in this case, respondent discounts these cases because they "contravene" this Court's decisions in *Brockett* and *Jopes*. Opp. 13 n.7. Of course, it is no answer to deny the existence of a split among the federal courts on the basis that the cases on one side of the split are purportedly incorrect.

that the "only apparent exception" to *Kermarec*'s reasonable care standard is in cases of crew member misconduct. Furthermore, as explained *supra* note 4, the First Circuit's decision in *Muratore* suggests that it did apply a reasonable care standard in holding the ship liable for the actions of its photographer crew members. Finally, the Eighth Circuit's decision in *Gilstrap v. Amtrak*, 998 F.2d 559 (8th Cir. 1993), held only that as a matter of Washington state law, the Washington Supreme Court's 1912 decision in *Marks v. Alaska Steamship Co.*, 71 Wash. 167 (1912), remained controlling in that state. 998 F.2d at 563. *Gilstrap* never discusses, or even cites, *Kermarec*, *Brockett*, or *Jopes*. For all of her effort to demonstrate an unbroken line of authority rejecting petitioners' contention that *Kermarec* has left *Brockett* and *Jopes* behind, respondent has but two cases to support her view: *Morton* and the Eleventh Circuit's case below.

3. Finally, even if respondent could be said to have correctly described current law as consisting of two distinct strands of liability applicable to cruise ships that can coexist in practice—*i.e.*, courts universally impose a strict liability standard for intentional torts committed by crew members, and a reasonable care standard for all other torts—respondent never explains why that unusual situation should persist. Indeed, it would not be surprising for lower federal courts to adhere to *Brockett* and *Jopes* when they are presented with fact patterns that resemble those that were presented in those nineteenth-century cases, particularly given this Court's repeated admonition that lower courts not take it upon themselves to infer the overruling of prior cases that would otherwise be controlling. *See, e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1988); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Of course, the issue for this Court to determine is not how it would understand current law if it were a lower federal court, but rather whether to hold onto a 115 year-old strict liability relic that does not comport with intervening changes in the law and advancements that have transformed cruise travel from a transportation-based experience to a modern form of leisure.

See Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169, 2175 (2005) (noting that cruise ships "are essentially floating resorts"). Because those questions require this Court's guidance and judgment, as the Eleventh Circuit recognized below, Pet. App. 35a, this Court should grant the petition even if it were to agree with respondent's position that there is not a split of authority among the federal courts.

CONCLUSION

For all the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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